CONSOLIDATED CREDIT COMPANY SDN BHD

v.

GLADYS LOH & ORS AND ANOTHER CASE

HIGH COURT MALAYA, PULAU PINANG
S NANTHA BALAN JC
[ORIGINATING SUMMONS NO: 24-591-2008;
ORIGINATING MOTION NOTICE NO: 25-60-2008]
9 SEPTEMBER 2013

CIVIL PROCEDURE: *Affidavits - Affidavit-in-reply - Failure to file - Whether assertion deemed admitted*

EQUITY: *Equitable interests - First in time prevails - Priority of equitable interest lost or forfeited due to indolence - Failure to enter lien-holder's caveat - Whether equitable lien created with priority over other subsequent legal or equitable interest - Whether priority lost or forfeited due to inordinate delay*

LAND LAW: *Caveat - Lien-holder's caveat - Entry of - Whether created interest in land - Whether entry prohibited by existence of prior private caveat*

LAND LAW: *Caveat - Lien-holder's caveat - Removal of - Whether persons other than registered proprietor may apply for cancellation of lien-holder's caveat - Whether beneficial owner of property had locus standi to apply for removal of lien-holder's caveat - National Land Code, s. 331(4)*

LAND LAW: *Caveat - Private caveat - Restriction in dealings - Whether existence of private caveat prohibited entry of subsequent lien-holder's caveat*

LAND LAW: *Lien - Statutory lien - Creation of - Deposit of title coupled with non-entry of lien-holder's caveat - Whether equitable lien created with priority over other subsequent legal or equitable interest - Whether priority lost or forfeited due to inordinate delay*

The dispute pertained to a property known as No. 13 Jalan Brook, 10450 Pulau Pinang ('the property') owned by the late Loh Hoot Yeang ('Loh'). One Derrick Edwin David ('Derrick'), who had been in occupation of the property since 1970 claimed that Loh had orally agreed to sell the property to him for

RM60,000. Derrick had sued Loh in the High Court ('the 2000 suit') and had obtained an order of specific performance to enforce the oral agreement. Immediately thereafter, Derrick paid the full purchase price for the property which was unconditionally accepted by Loh. Nevertheless, Loh did not transfer the property to Derrick. In order to protect his interest over the property, Derrick had entered several caveats in respect of the property on the following dates: on 26 February 2000 ('first caveat'); on 4 June 2007 ('second caveat'); and on 16 May 2013 ('third caveat'). After Derrick entered the second caveat on 4 June 2007, Consolidated Credit Company Sdn Bhd ('Consolidated Credit') surfaced for the first time claiming to have a lien over the property. They entered a lien-holder's caveat over the property on 5 June 2007. Consolidated Credit claimed that in 1998 Loh had deposited the original title to the property with them as security for loans granted by them to Loh. To that end, in 2007, Consolidated Credit filed a suit against Loh and obtained judgment in default against him. They now sought to obtain an order for sale of the property and to have Derrick's second caveat removed. Consolidated Credit filed an originating summons ('the OS') whereas Derrick filed an originating motion ('the OM'). Both the OS and OM were consolidated. Neither Loh (when he was alive) nor his estate filed any affidavits in the proceedings. Hence, Consolidated Credit urged the court to rule that as the averments by Consolidated Credit stood uncontradicted by Loh (and his estate), they were deemed admitted, it precluded any suggestion to the contrary by Derrick who sought to repudiate all of Consolidated Credit's averments. Derrick argued that: (i) there was no basis for a lien-holder's caveat as there was no credible evidence of Loh having deposited the original title to the property with Consolidated Credit in 1998; (ii) the lien-holder's caveat was in law, a nullity; (iii) even if Loh had deposited the title in 1998 and there was only a lien in equity, it had no bearing on Derrick who was a *bona fide* purchaser for value without notice of any earlier lien in equity; and (iv) any priority created by the alleged lien in equity was, in any event, lost due to the inaction or failure or indolence on the part of Consolidated Credit to enter the lien-holder's caveat at any time prior to 5 June 2007 and their failure to intervene in the 2000 suit commenced by Derrick against Loh and to assert their rights as the holders of a lien in equity.

Consolidated Credit contended that Derrick had no *locus standi* to impeach the lien-holder's caveat on the grounds that only the registered owner could apply to have the lien-holder's caveat cancelled.

Held (allowing Derrick's application; dismissing Consolidated Credit's application with costs):

(1) Consolidated Credit was essentially a family owned company with Loh as its managing director and shareholder, and his wife and children as directors and shareholders. As such, it was no surprise that neither Loh (when he was alive) nor his estate had filed any affidavit to repudiate the averments made by Consolidated Credit. (para 29)

(2) Loh family and Consolidated Credit were inseparable. Hence, whether the property remained with Loh or his estate or fell into the hands of or was disposed of by Consolidated Credit, it still remained as part of the assets of the Loh estate either directly or indirectly through the shareholding and complete control of Consolidated Credit. (para 31)

(3) Once the full purchase consideration has been received by the vendor, the vendor becomes bare trustee for the purchaser. Derrick had been in occupation and possession of the property since 1970. Derrick could thus be regarded a proprietor in equity or a beneficial owner of the property, which gave him the requisite *locus standi* to apply to have the lien-holder's caveat cancelled. (para 64)

(4) There is nothing in the language of s. 331(4) of the National Land Code ('NLC') which supports Consolidated Credit's claim that only a registered proprietor may apply for cancellation of a lien-holder's caveat which had been wrongly or improperly entered. In fact, s. 331(4)(b) of the NLC tacitly recognises that persons other than the registered proprietor may apply for cancellation of the lien-holder's caveat. (paras 65 & 66)

(5) Section 281 of the NLC provides that the party holding the title as security for a loan obtains a statutory lien only upon entry of a lien-holder's caveat. The single most essential fact that had to be established by Consolidated Credit was that

there was a deposit of title by Loh (the registered proprietor) to the lender (Consolidated Credit) coupled with an intention on the part of the registered proprietor (Loh) when depositing the title that it be held as security for a loan. There were enough strands of evidence which negated or vitiated the probability of a deposit of title to the property by Loh to Consolidated Credit in 1998. (paras 71 & 121)

(6) Section 322(2) read with s. 330(3) of the NLC expressly prohibits the endorsement or entry on the register document of title of any lien-holder's caveat and the Registrar is expressly prohibited from entering a lien-holder's caveat on the register document of title 'by any Registrar's Caveat, private caveat, trust caveat or prohibitory order'. Hence, there could be no endorsement or entry of the said lien-holder's caveat on 5 June 2007 and Consolidated Credit was prohibited from entering the said lien-holder's caveat over the property, as at the material time, the property was already subject to the second caveat. (paras 123 & 126)

(7) On the assumption that the title to the property was in fact deposited with Consolidated Credit in or around March 1998, notwithstanding their failure to enter a lien-holder's caveat timeously, they would have acquired a lien in equity or interest in the property which had priority over any other interest legal or equitable that may arise subsequently thereafter. However, even if Consolidated Credit had a lien in equity which accrued prior in time to Derrick's beneficial interest over the property, such priority as they may have had was lost or forfeited due to their wanton inaction, omission and inordinate delay. (paras 160 & 166)

Case(s) referred to:

Abigail v. Lapin [1934] AC 491 ***(refd)***

Bhagwan Singh & Co Sdn Bhd v. Hock Hin Bros Sdn Bhd [1986] 2 CLJ 224; [1986] CLJ (Rep) 300 HC ***(refd)***

Borneo Housing Mortgage Finance Bhd v. Time Engineering Bhd [1996] 2 CLJ 561 FC ***(refd)***

Butler v. Fairclough (1916-17) 23 CLR 78 ***(refd)***

Chua Hee Hung & Ors v. QBE Supreme Insurance Bhd [1990] 1 CLJ 669; [1990] 1 CLJ (Rep) 49 SC ***(refd)***

Chuah Eng Khong v. Malayan Banking Bhd [1999] 2 CLJ 917 FC ***(refd)***

Hock Hua Bank (Sabah) Bhd v. Yong Liuk Thin & Ors [1995] 2 CLJ 900 CA ***(refd)***

Jasalam (M) Sdn Bhd v. Wong Koon Yee [2000] 2 CLJ 377 CA ***(foll)***
Lee Chin Cheng Dengkil Oil Palm v. Kaplands Sdn Bhd [2002] 4 CLJ 753 CA ***(refd)***
Loke Yew v. Port Swettenham Rubber Company [1913] AC 491 ***(refd)***
Mercantile Bank Ltd v. The Official Assignee of the Property of How Han Teh [1969] 1 LNS 106 HC ***(refd)***
Minang Bina Sdn Bhd lwn. Yahya Mohd Said & Yang Lain [1992] 1 CLJ 70 [1992] 1 CLJ (Rep) 503 HC ***(refd)***
Ng Hee Thoong & Anor v. Public Bank Berhad [1995] 1 CLJ 609 CA ***(not foll)***
Smith v. Clay (1767) 3 Bro CC 639 ***(refd)***
Standard Chartered Bank v. Yap Sing Yoke [1989] 1 CLJ 530 HC ***(refd)***
Temenggong Securities Ltd & Anor v. Registrar of Titles, Johore & Ors [1974] 1 LNS 175 FC ***(refd)***
The HongKong & Shanghai Banking Corporation v. Hj Salam Hj Daud & Ors; RHB Bank Bhd (Intervenor) [2002] 4 CLJ 659 HC ***(foll)***
United Malayan Banking Corporation Bhd v. Goh Tuan Laye & Ors [1975] 1 LNS 187 FC ***(refd)***
Vallipuram Sivaguru v. P C R M Palaniappa Chetty Official Administrator as Administrator of the Estate of Gan Inn, Deceased [1936] 1 LNS 69 HC ***(foll)***
Wilkins And Others v. Kannammal & Anor [1951] 1 LNS 108 HC ***(refd)***
Woon Kim Poh v. Sa'amah Hj Kasim [1986] 1 LNS 45 SC ***(refd)***
Yeong Ah Chee @ Yan Hon Wah v. Lee Chong Hai & Anor And 13 Other Appeals [1994] 3 CLJ 20 SC ***(refd)***

Legislation referred to:
National Land Code, ss. 134, 281(1), (2), 322(1), (2), (6), 328(1), 330(1), (3), 331(4)

Other source(s) referred to:
Judith Sihombing, *The National Land Code - A Commentary*, LexisNexis 2011, para 5703
Yong Chiu Mei, *The Concept and Nature of Liens and the Legal Effect of Imperfect Liens under the Peninsular Malaysian Land Law*, The Law Review 2007, p 579

(Originating Summons No: 24-591-2008)
For the plaintiff - Paari Perumal (MS Rajendran & Nurul Aliaa Azman with him); M/s Rajen and Lim
For the 1st defendant - Jenny Saw Lye Hong; M/s Choy & Assocs
For the 2nd defendant - Robert Lazar & JJ Chan (Siti Hawa Ahmad Aani with him); M/s Shearn Delamore & Co
For the 3rd defendant - Ooi Chooi Ghaik; FC

A *(Originating Motion Notice No: 25-60-2008)*
For the applicant - Robert Lazar & Jff Chan (Siti Hawa Ahmad Aani with him); M/s Shearn Delamore & Co
For the 1st respondent - Ooi Chooi Ghaik; FC
For the 2nd respondent - Jenny Saw Lye Hong; M/s Choy & Assocs
B *For the 3rd respondent - Paari Perumal (MS Rajendran & Nurul Aliaa Azman with him); M/s Rajen and Lim*

Reported by Amutha Suppayah

C

JUDGMENT

S Nantha Balan JC:

Introduction

D **[1]** This case raises several issues pertaining to, *inter alia*, statutory rights and interest as may arise under the National Land Code ("the NLC") and equitable interests over land.

[2] Specifically, the issues pertain to the creation of a statutory E lien and/or a lien in equity and whether a lien in equity may exist alongside and with priority over any statutory right or interest that may be acquired under the NLC or any other equitable right or interest.

F **[3]** Next, the case examines the rule relating to priority of interest ie, that in equity, all things being equal, the first in time prevails and whether priority of any equitable interests may be lost or forfeited due to any act or omission or indolence of the claimant of the prior equitable interest which might have had the G effect of inducing a claimant later in time to act to his prejudice.

[4] A significant aspect of the case is whether a lien-holder's caveat which was entered whilst there is already a private caveat on the register of titles contravenes ss. 322(2) and 330(3) NLC and is invalid and a nullity.

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[5] The other issue that arose for consideration is whether any person (not being a registered proprietor of land) but directly affected by and who had suffered loss and damage as a result of a lien-holder's caveat which had been improperly entered has *locus* I *standi* and may apply to have the lien-holder's caveat cancelled.

[6] The case also considers the nature and quality of evidence necessary to qualify as credible evidence to persuade the court as a matter of probabilities that there was a deposit of title as security for a loan for the purposes of fulfilling the statutory pre-requisite under s. 330(1) of the NLC.

The Parties

[7] The parties to these consolidated proceedings are Consolidated Credit Company Sdn Bhd (as the plaintiff in the originating summons) and Gladys Loh (no. K/P: 250922-07-5052) and Loh Wei Leng (no. K/P: 480129-07-5448) (as the executrix of the estate of Loh Hoot Yeang, deceased), Derrick Edwin David and the Pendaftar Hakmilik Tanah as the first, second and third defendants respectively.

[8] In the originating motion, Derrick Edwin David is the plaintiff and all other parties in the originating summons are the defendants.

[9] The dominant parties to the dispute arising under these proceedings are Consolidated Credit Company Sdn Bhd ("Consolidated Credit") and Derrick Edwin David ("Derrick") but the entire factual substratum of this case revolves around the conduct and/or knowledge of the late Loh Hoot Yeang ("Loh") whose estate is now a party to but remained passive in these proceedings.

[10] Loh was the managing director of Consolidated Credit and resigned from that position on 22 May 2007. The dispute pertains to property known as Lot 1064 held under Geran No Perserahan 3158, Seksyen 2, Daerah Timur Laut, Bandar Georgetown, Pulau Pinang which was also known as No. 13 Jalan Brook, 10450 Pulau Pinang ("the property").

The Dispute Between Derrick And Loh

[11] The property was at all times owned by Loh. The legal battle started off initially between Derrick and Loh over the property.

[12] Derrick has been in occupation of the property since 1970. He claimed that Loh had orally agreed to sell the property to him for RM60,000. A dispute arose between Derrick and Loh over the

property and Derrick sued Loh by way of Penang High Court suit no. 22-246-2000 (MT4) ("the 2000 suit") for an order of specific performance to enforce the oral agreement.

[13] On 13 November 2003 judgment was given in favour of Derrick in the 2000 suit. That judgment essentially declared that Derrick has been in occupation of the property since 1970 and that Loh had agreed to sell the property to Derrick for RM60,000 and ordered that that agreement be specifically performed. In pith and substance it was an order for specific performance of an oral agreement between Derrick and Loh.

[14] Loh appealed to the Court of Appeal and the appeal was dismissed on 25 January 2006.

[15] On 21 March 2007, Loh's application for leave to appeal to the Federal Court was dismissed. Loh was stuck with the judgment of the High Court in the 2000 suit.

[16] Immediately thereafter, on or around 26 March 2007 Derrick duly tendered payment of RM60,000 being the full purchase consideration for the property which was unconditionally accepted by Loh. Despite exhausting all legal avenues and challenges, and after having accepted the sum of RM60,000 from Derrick, Loh did not transfer the property to Derrick.

[17] During the currency of the 2000 suit, and in order to protect his interest over the property, Derrick entered a caveat in respect of the property on 26 February 2000 ("first caveat").

[18] Under s. 328(1) of the NLC, a private caveat is valid for six years only and automatically lapses at the end of that period. Section 328(1) NLC reads as follows: "(1) A private caveat shall, if not sooner withdrawn under s. 325 or lapsing pursuant to sub-s. (1B) of s. 326 or removed by the Registrar pursuant to an order of the court under s. 327, lapse at the expiry of six years from the time from which it took effect, and the entry thereof may be cancelled accordingly by the Registrar, either of his own motion or on an application in that behalf by any interested person or body."

[19] Hence, by virtue of s. 328(1) NLC, the first caveat lapsed on 25 February 2006. Then, after he obtained judgment in the 2000 suit, Derrick entered a further caveat on 4 June 2007 ("second caveat").

[20] The second caveat was predicated on the fact that Derrick had obtained an order for specific performance and that he had paid the purchase consideration to Loh and that the latter had failed to transfer the property to him.

[21] The second caveat lapsed on 3 June 2013. However, shortly before the second caveat lapsed, Derrick entered yet another caveat on 16 May 2013 ("third caveat"). The third caveat still remains in force. It is significant that at no time did Loh (and after he died, his estate) apply to remove any of the caveats lodged by Derrick.

Emergence Of Consolidated Credit As A Claimant

[22] After Derrick entered the second caveat on 4 June 2007, Consolidated Credit reared their head and surfaced for the first time as a party which claimed to have a lien over the property. They entered a lien-holder's caveat over the property on 5 June 2007.

[23] The entry of Consolidated Credit changed the equation of the legal battle as they claimed that in 1998 Loh had deposited the original title to the property with them as security for loans granted by them to Loh.

[24] To that end, in 2007, Consolidated Credit filed a suit against Loh and obtained judgment in default against him. They now seek to obtain an order for sale of the property as provided for under the NLC. They are also seeking to have Derrick's second caveat removed.

[25] It is significant that after the first caveat was entered on 26 February 2000 Consolidated Credit did not apply to have it removed.

[26] On 16 April 2008, Consolidated Credit filed an originating summons no. 24-591-2008 ("the OS") whereas Derrick filed an originating motion no. 25-60-2008 on 4 June 2008 ("the OM"). Both the OS and OM were consolidated by the order of court dated 23 June 2009. During the currency of the OM and OS, Loh died and was and still is the registered owner of the property. These consolidated proceedings are essentially between Derrick and Consolidated Credit. Neither Loh (when he was alive) nor his estate have filed any affidavits in these proceedings. They remained passive.

A **Whether The *Ng Hee Thoong* Principle Applies**

[27] Relying on the fact that neither Loh (when he was alive) nor his estate have filed any affidavits in these proceedings, Mr. Paari Perumal, learned counsel for Consolidated Credit urged me to
B apply the principle enunciated by the Court of Appeal in *Ng Hee Thoong & Anor v. Public Bank Berhad* [1995] 1 CLJ 609; [1995] 1 MLJ 281 ("*Ng Hee Thoong* principle") and rule that as the averments by Consolidated Credit stand uncontradicted by Loh (and his estate), they are deemed admitted and this therefore
C precludes any suggestion to the contrary by Derrick who sought to repudiate all of Consolidated Credit's averments particularly with regards to the alleged deposit of title to the property in 1998 by Loh to Consolidated Credit as security for loans by the latter to the former.

D **[28]** Of course, ordinarily I might have been persuaded to take that route and make the necessary inferences and assumptions/ conclusions as a natural consequence of a failure by the opposite side to file an affidavit responding to and replying to all of the
E material aspects of the averments in the first party's affidavit, but in the present case it would be naive to regard this as an ordinary case as the relationship between the parties is relevant and significant in that there is a closeness of relationship or consanguinity between Loh (and his family) and Consolidated
F Credit of such a magnitude that it would be artificial and unreal to treat them as separate parties.

[29] In my view, they are one and the same. My conclusion in this regard is predicated on the incontrovertible fact that Consolidated Credit is essentially a family owned company with
G Loh as its managing director and shareholder, and his wife (Gladys Loh Yeap Chin Joo) and children (Laurence Loh Kwong Yu and Nigel Loh Kwong Weng) as directors and shareholders. Loh was initially the director primarily responsible for the financial affairs of the company for the purposes of the declarations made with
H respect to the audited accounts of Consolidated Credit. Later, Nigel Loh Kwong Weng became the director primarily responsible for the financial affairs of the company. As such, it is no surprise that neither Loh (when he was alive) nor his estate had filed any affidavit to repudiate the averments made by Consolidated Credit.

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[30] In my view, if the *Ng Hee Thoong* principle is applied across the board without exception, then there is a possibility that such indiscriminate application of that very sound principle is liable to produce manifest injustice. As such, in appropriate circumstances and situations, a departure from the *Ng Hee Thoong* principle may be warranted. In such a situation, the court should not rush to draw conclusions merely because of the non-reply by affidavits by any party, particularly where there may be active or passive or implicit co-operation between the maker of the averment of the one side and the non-reply by the other party on the other side.

[31] In this case, in any which way one looks at it, the Loh family and Consolidated Credit are inseparable. Hence, whether the property remains with Loh or his estate or falls into the hands of or is disposed of by Consolidated Credit, it still remains as part of the assets of the Loh estate either directly or indirectly through the shareholding and complete control of Consolidated Credit. It was for these exceptional reasons that I declined the invitation to apply the *Ng Hee Thoong* principle and instead tested the averments made by Consolidated Credit on the one side with the diametrically opposite averments made by Derrick on the other side.

Synopsis Of The Positions Taken By The Parties

[32] Although it is alleged that in 1998 Loh had deposited the original title to the property with Consolidated Credit as security for loans granted by Consolidated Credit to Loh, it is material to note that the former never lodged any lien-holder's caveat until 5 June 2007 (almost nine years later). In fact, Consolidated Credit did absolutely nothing from the time the title to the property was allegedly deposited with them until the lien-holder's caveat was lodged on 5 June 2007. But by the time Consolidated Credit entered the lien-holder's caveat on 5 June 2007, Derrick's first caveat had lapsed but the second caveat was already on the register of title for the property. One of the critical issues that arose for consideration in this case is whether the lien-holder's caveat lodged by Consolidated Credit is valid in view of the express prohibition in s. 330(3) read with ss. 322(1) and (2)(c) of the NLC which clearly provides that no lien-holder caveat shall be entered if there is already a private caveat on the register of title.

[33] Apart from contending that there was no deposit or that there could not have been any deposit of title by Loh to Consolidated Credit in 1998, Derrick is also relying chiefly on the abovementioned statutory provisions in order to impugn the lien-holder's caveat whereas Consolidated Credit maintain that they have a valid lien-holder's caveat, or alternatively that they have a lien-holder's caveat in equity, which they say arose earlier in point of time and which prevails over Derrick's alleged rights in and over the property. Loh passed away on 18 January 2011 and has been substituted by Gladys Loh and Loh Wei Leng as the executrix of the estate of Loh *via* court order dated 13 September 2012.

[34] As stated earlier, the NLC prohibits the entry of a lien-holder's caveat if there is already a private caveat on the register. Strictly speaking, the Pendaftar Hakmilik Tanah ought to have rejected the application by Consolidated Credit for entry of a lien-holder's caveat. But that did not happen. Instead the lien-holder's caveat was registered notwithstanding the express statutory prohibition. The entry of the lien-holder's caveat was obviously a mistake on the part of the Pendaftar Hakmilik Tanah as they ought to have rejected it because of the presence of Derrick's second caveat. It therefore came as no surprise that the Pendaftar Hakmilik Tanah admitted their mistake and said in their letter dated 29 May 2008 that the lien-holder's caveat 'should not have been registered and should accordingly be set aside', and that 'an order of court should be obtained to set aside the lien-holder's caveat' (see p. 126 bundle B). In keeping with that position, Ms. Ooi Chooi Ghaik, Senior Federal Counsel who appeared on behalf of the Pendaftar Hakmilik Tanah agreed with Mr Robert Lazar (learned counsel appearing for Derrick) and said that the lien-holder's caveat was wrongly entered and ought to be set aside.

[35] It was Mr Lazar's primary argument, that there was no basis for a lien-holder's caveat as there is no satisfactory or credible evidence of Loh having deposited the original title to the property with Consolidated Credit in 1998. He said that if all the affidavits are analysed and subjected to critical analysis then it would be apparent that the suggestion by Consolidated Credit that Loh had deposited the original title to the property in 1998 would be an inherently incredible one.

[36] Secondly, he said that in any event, the lien-holder's caveat was in law, a nullity having regard to the provisions of the NLC and that, consequently, the said lien-holder's caveat ought to be set aside.

[37] Thirdly, he said even if Loh had deposited the title in 1998 and there is only a lien in equity, it had no bearing on Derrick who was a *bona fide* purchaser for value without notice of any earlier lien in equity.

[38] Then, Mr Lazar said that any priority based on the lien in equity was lost due to Derrick's beneficial interest crystallising in March 2007 when he paid the full purchase consideration to Loh's solicitors and which was duly accepted.

[39] Mr Lazar concluded by submitting that any priority created by the alleged lien in equity was in any event lost due the inaction or failure or indolence on the part of Consolidated Credit to enter the lien-holder's caveat at any time prior to 5 June 2007 and their failure to intervene in the 2000 suit commenced by Derrick against Loh and to assert their rights as the holders of a lien in equity.

[40] He emphasised that Consolidated Credit knew about the 2000 suit and had stood by and allowed the legal action to take its course and remained passive throughout the journey of the suit and did nothing even after judgment was entered against Loh in 2003. He said that as Loh was managing director of Consolidated Credit all along, the knowledge that Loh possessed as regards Derrick's claim over the property and the 2000 suit etc, must necessarily be imputed to Consolidated Credit.

[41] It was only on 5 June 2007 that Consolidated Credit's lien-holder's caveat came to be registered which is one day after Derrick's private caveat had been entered on 4 June 2007. So it was just before 5 June 2007 that Consolidated Credit took steps to lodge a lien-holder's caveat. By that time, Derrick had already obtained judgment for specific performance in the 2000 suit, and paid the purchase consideration to Loh's solicitor who accepted the same unconditionally. Also and very significantly, Derrick's second caveat had already been registered on 4 June 2007.

[42] On the other hand, Mr Paari Perumal took a preliminary point and contended that Derrick had no *locus standi* to impeach the lien-holder's caveat. According to him, only the registered

owner can apply to have the lien-holder's caveat cancelled. It was also argued for Consolidated Credit that in any event, even if there is no valid lien-holder's caveat, they still have a lien in equity and they were entitled to enter a lien-holder's caveat at any time. It was also contended that with the lapse of Derrick's second caveat, the argument about the lien-holder's caveat being invalid due to the presence of Derrick's second caveat no longer holds water. Hence, the lien-holder's caveat must be regarded as valid and given full effect and enforced as such. It was also contended that as Derrick had admitted during cross-examination on his affidavits that he could not prove any fabrication and conspiracy between Loh and his family members to defeat the judgment that he had obtained against Loh, this court ought not to entertain the invitation to impeach the assertion of a deposit of the title by Loh in 1998 as that would only be feeding the fraud or fabrication theory which cannot be taken up in a contest of affidavits.

[43] I will now proceed to set out the factual narrative and highlight various parts of the submissions that were made in respect of the issues that arose for consideration. For the purposes of easy identification and quick referencing, the parties herein had filed a core bundle of cause papers (marked as "bundle A") and a core bundle of documents (marked as "bundle B"). The documents in bundle A are all the cause papers relating to the applications filed by Consolidated Credit Company Sdn Bhd (the OS) and Derrick (the OM). The documents in bundle B are all the exhibits to the affidavits filed in the OS and OM respectively. As such, wherever necessary I shall refer to the cause papers or documents by the page number in bundle A or B respectively. For ease of reference and to avoid confusion, I shall refer to the parties as Loh, Consolidated Credit and Derrick respectively.

The Previous Suits And The OS/OM

[44] Before the OS and OM were filed, there were two civil actions:

(i) A civil action by Derrick against Loh *via* Penang High Court Civil suit no. 22-246-2000 ("the 2000 suit") wherein the High Court granted a declaration that Derrick is and has been in occupation of house no. 13, Brook Road, 10450 Penang pursuant to an agreement made sometime in August 1970

between Derrick as purchaser and Loh as vendor, whereby Loh had agreed to sell and David had agreed to purchase the said house for a purchase price of RM60,000 ("the 2003 judgment"); and

(ii) A civil action brought by Consolidated Credit against Loh *via* Penang High Court suit no. 22-346-2007 to recover an outstanding sum of RM7,378,695 whereby a judgment in default was entered on 20 July 2007 ("2007 debt recovery judgment").

Reliefs Sought In Consolidated Credit's OS

[45] These are the reliefs sought by Consolidated Credit in their OS.

(i) a declaration that the lien-holders' caveat lodged under presentation no. 7819/2007 against Lot No. 1064, Section 2 held under Geran Perserahan No. 3158, Daerah Timur Laut, Bandar Georgetown, Pulau Pinang bearing address No. 13, Jalan Brook, 10450, Pulau Pinang ('the property') is valid notwithstanding that it had only been lodged after the lodgement of Derrick's private caveat on 4 June 2007 under presentation no. 7777/2007;

(ii) that pursuant to the order of the High Court dated 20 July 2007 under Penang High Court civil suit no. 22-346-2007 [between Consolidated Credit as plaintiff (creditor) and Loh as defendant (debtor)], the property under the lien-holder's caveat presentation no. 7819/2007 be sold by way of public auction;

(iii) that the private caveat lodged on 4 June 2007 by the Derrick against the property under presentation no. 7777/2007 be cancelled;

(iv) that the Registrar's caveat lodged on 15 January 2008 by the Pendaftar Hakmilik Tanah against the property under presentation no. 602/2008 be cancelled; and

(v) that the Derrick and the Pendaftar Hakmilik Tanah or their agent/or representative be restrained from lodging any further caveats on the property.

A **Reliefs Sought In Derrick's OM**

[46] These are the reliefs sought in the OM filed by Derrick:

(i) an order that the Pendaftar Hakmilik Tanah shall forthwith cancel and remove the lien-holder's caveat presentation no. 7819/2007 lodged by Consolidated Credit Company Sdn Bhd against all that piece of land known as Lot 1064, Section 2, Town of Georgetown, North East District, Penang held under Geran No. Pendaftaran 3158 from the register document of title;

(ii) a declaration that Derrick is the beneficial owner of the land known as Lot No. 1064, Section 2, Bandar Georgetown, Daerah Timur Laut, Pulau Pinang held under Geran No. Pendaftaran 3158 ("the property") in pursuant to the Order of the High Court dated 13 November 2003 under Penang High Court civil suit no. 22-246-2000;

(iii) an order that Consolidated Credit Company do deliver the issue document of title in respect of the property free from encumbrances to Derrick as beneficial owner of the property or to his solicitors, Messrs Shearn Delamore & Co, 6th Floor, Wisma Penang Garden, No. 42, Jalan Sultan Ahmad Shah, 10050 Penang within seven days from the service of the order of court herein;

(iv) an order that Loh Hoot Yeang and Consolidated Credit do pay damages to Derrick as a result of the entry of the said lien-holder's caveat presentation no. 7189/2007 to be assessed by the Senior Assistant Registrar of the High Court; and

(v) that the Pendaftar Hakmilik Tanah be directed to take all necessary steps and to make such necessary memorials or vesting order to give effect to the order herein.

The Issues

[47] The following are the issues that were formulated by the parties or which necessarily arose in the course of the submissions that were taken before this court:

(i) Whether Derrick, not being the registered proprietor of the property had the requisite *locus standi* to make the application for cancellation of the lien-holder's caveat?

(ii) Whether Loh did in fact lodge the issue document of title to the property with Consolidated Credit on 29 March 1998 as security for loans granted by the latter to the former?

(iii) Whether Consolidated Credit's lien-holder's caveat which was entered one day after Derrick's private caveat contravenes ss. 322(2) and 330(3) NLC and is invalid and a nullity.

(iv) Whether Derrick's second caveat which lapsed by operation of law (ie, s. 328(1) NLC) on 3 June 2013, had subsequent to that date become a non-issue or irrelevant *vis-à-vis* the lien-holder's caveat and/or was no longer an impediment to the validity of the lien-holder's caveat entered on 5 June 2007?

(v) Alternatively, whether (assuming there was a deposit of title in 1998) Consolidated Credit acquired a lien in equity?

(vi) Whether priority of any equitable interests by way of a lien in equity was lost or forfeited due to any act or omission or indolence of Consolidated Credit which might have had the effect of inducing Derrick in time to act to his prejudice. Hence, the question is whether the priority created by the lien in equity, if any, was lost to Derrick's beneficial interest that crystallised upon full payment of the purchase consideration for the property (RM60,000) on or about March 2007 or was lost due to any act or omission or indolence on the part of Consolidated Credit?

Chronology Of Events

[48] The long history of the main events that transpired between the parties are as set out in chronology of events prepared by Derrick's solicitors and which were filed as part of the submissions. For ease of references, I have duly reproduced and incorporated the chronology of events in this judgment.

Chronology of Events

DATE	EVENT	REFERENCE
August 1970	Oral agreement between Loh and Derrick for purchase of property at 13, Brook Road, Penang	Order of High Court dated 13/11/2003, Ex. DED-3 to Affidavit of Derrick affirmed on 4/6/2008 (Encl. 2)(B) in OM 25-60-2008

29/3/1998	Loh purportedly pledges title to No. 13, Brook Road to Consolidated Credit Company Sdn Bhd ("Consolidated Credit") for credit facilities	Ex. LL-1 to Affidavit of Laurence Loh Kwong Yu (Encl. 7)(G) in OM 25-60-2008
26/2/2000	Derrick lodges private caveat over property	Property search dated 17/1/2008, Ex. DED-1 to Affidavit of Derrick affirmed on 4/6/2008 (Encl. 2)(B) in OM 25-60-2008
13/11/2003	Order of High Court ordering Loh to transfer property (the 2003 Judgment)	Ex. DED-3 to Affidavit of Derrick affirmed on 4/6/2008 (Encl. 2)(B) in OM 25-60-2008
25/1/2006	Court of Appeal dismisses Loh's appeal	Ex. DED-4 to affidavit of Derrick affirmed on 4/6/2008 (Encl. 2)(B) in OM 25-60-2008
15/3/2006	Loh affirms statutory declaration to support application for issue of replacement title	Ex. DED-1 to Affidavit of Derrick affirmed on 3/7/2008 (Encl. 10)(H) in OM 25-60-2008
22/6/2006	Land office issues duplicate title property	Property search dated 17/1/2008, Ex. DED-1 to Affidavit of Derrick affirmed on 4/6/2008 (Encl. 2)(B) in on 25-60-2008
21/3/2007	Federal Court refuses leave on Loh's application	Ex. DED-4 to Affidavit of Derrick affirmed on 4/6/2008 (Encl. 2)(B) in OM 25-60-2008
26/3/2007	Derrick's solicitors tender payment	Ex. DED-5 to Affidavit of Derrick affirmed on 4/6/2008 (Encl. 2)(B) in OM 25-60-2008

11/4/2007	Loh accepts cheque which is cleared for payment	Para 10 of Affidavit of Derrick affirmed on 4/6/2008 (Encl. 2)(B) in OM 25-60-2008
17/4/2007	Loh's solicitors write to Derrick's solicitors to say "our client is still trying to come to terms with the dismissal of his application for leave ..."	Ex. DED-7 to Affidavit of Derrick affirmed on 4/6/2008 (Encl. 2)(B) in OM 25-60-2008
4/6/2007	Derrick lodges private caveat over property	Property search dated 17/1/2008, Ex. DED-1 to Affidavit of Derrick affirmed on 4/6/2008 (Encl. 2)(B) in OM 25-60-2008
5/6/2007	Consolidated Credit lodges lien-holder's caveat over property	Property search dated 17/1/2008, Ex. DED-1 to Affidavit of Derrick affirmed on 4/6/2008 (Encl. 2)(B) in OM 25-60-2008
20/7/2007	Consolidated Credit enters judgment against Loh	Ex. LL-4 to Affidavit of Laurence Loh Kwong Yu (Encl. 7)(G) in OM 25-60-2008
15/1/2008	Registrar's Caveat entered over property	Property search dated 17/1/2008, Ex. DED-1 to Affidavit of Derrick affirmed on 4/6/2008 (Encl. 2)(B) in OM 25-60-2008

[49] Derrick's claim to the property arises from an oral contract adjudged to have been entered into in August 1970, and so adjudicated by the 2003 judgment and affirmed by the order of the Court of Appeal dated 25 January 2006. The order for specific performance has been performed by Derrick but the late Loh had failed to hand over the issue document of the title and a registrable memorandum of transfer. As stated earlier, Derrick

lodged caveats which were registered on 26 February 2000, 4 June 2007 and finally on 16 May 2013. So in all Derrick had lodged three private caveats. The significance of the private caveats *vis-à-vis* the lien-holder's caveat and /or the lien in equity and/or the priority of the lien in equity over Derrick's beneficial interest in and over the property will be dealt with more comprehensively in the subsequent parts of this judgment.

[50] Derrick duly complied with the term of the 2003 judgment and paid the purchase consideration of RM60,000 to Loh's solicitors who duly and unequivocally and unconditionally accepted the monies and the only thing that was left outstanding was the delivery up of the issue document of title.

[51] As for the execution of the requisite transfer forms, it appears that Court of Appeal had ordered the Registrar of the High Court to execute the memorandum of transfer if Loh refused to do so. During the hearing of this matter, Mr Robert Lazar confirmed to this court that the Registrar had duly executed the transfer forms and the only matter that was outstanding was the delivery of the issue document of title, which was not at all forthcoming from Loh and later his estate.

[52] It is appropriate at this juncture to consider Consolidated Credit's claim in respect of the property which is said to arise out of:

(a) an alleged deposit of title on 29 March 1998 by Loh allegedly to secure a borrowing by Loh (see: p. 1 bundle B);

(b) a judgment in default in respect of the loan amount entered on 20 July 2007 (see: p. 83 bundle B); and

(c) a lien-holder's caveat lodged on 5 June 2007, one day after the private caveat lodged by Derrick.

[53] Consolidated Credit's position is that they have either a valid statutory lien or a lien in equity and are not at all obliged to deliver up the title to Derrick. They have asked for an order for the sale of the property in order that the proceeds of sale may be utilised to settle the amounts that are due and owing under the 2007 debt recovery judgment. Derrick says that there is no valid statutory lien or a lien in equity as there is no credible evidence of a deposit of title in 1998 and that the lien-holder's caveat

entered on 5 June 2007 is in any event a nullity and that any priority in respect of the lien in equity was lost due to inaction by Consolidated Credit.

Issue: Derrick's *Locus Standi*

[54] It was submitted by Mr Paari Perumal that Derrick does not have the requisite *locus standi* to cancel the lien-holder's caveat as only a registered proprietor can apply to court to cancel a lien-holder's caveat which had been improperly entered. He referred to s. 331(4) of the NLC. I have reproduced the whole of s. 331 NLC which read as follows:

> Determination of lien-holders' caveats
>
> (1) A lien-holder's caveat may be withdrawn at any time by a notice in writing given to the Registrar by the person or body for the time being entitled to the benefit of the lien, and the Registrar shall cancel the entry of the caveat as soon as may be after the notice is received.
>
> (2) Where any land or lease subject to a lien-holder's caveat is sold pursuant to an order of the Court made by virtue of sub-section (2) of section 281:
>
> (a) any certificate of sale presented for registration by the purchaser thereof shall be deemed for the purposes of this Chapter to have been presented with the consent of the lien-holder; and
>
> (b) upon the registration of the certificate, the caveat shall lapse, and the entry thereof be cancelled accordingly by the Registrar.
>
> (3) The Registrar may cancel any lien-holder's caveat upon proof to his satisfaction that all sums due under the lien have been duly paid.
>
> (4) Where the Court is satisfied that any lien-holder's caveat ought not to have been entered, or ought to have been withdrawn, it may order:
>
> (a) the cancellation thereof by the Registrar; and
>
> (b) if the entry or failure to withdraw has caused damage or loss to any person or body, the payment of compensation by the person or body at whose instance the entry was made or, as the case may be, by whom the withdrawal ought to have been effected.

A (5) On cancelling the entry of any caveat pursuant to this section, the Registrar shall note on the register document of title the reason for the cancellation and the date thereof; and where any such entry is cancelled by reason of the withdrawal of the caveat, the Registrar shall give notice of the withdrawal to the person or body for the time being entitled to the land or lease formerly affected.

B

(6) Every cancellation under sub-section (5) shall be signed and sealed.

C **[55]** Then counsel also referred to an article titled as *The National Land Code – A Commentary* by Judith Sihombing – LexisNexis 2011 at para. 5703, where the author says that, "An improperly entered lien-holder's caveat, or one entered properly but no longer needed, can be cancelled by court order on the application of the

D proprietor of the land, lease or undivided share. It is only in these circumstances that the proprietor of the land or interest affected can seek compensation if the caveat has been entered improperly. However, to do so he must prove that he has suffered actual loss for the "gist of the action is not the maliciously and falsely setting

E up of a title to property, but the damage that arises from it."

[56] It was submitted by learned counsel that s. 331(4) NLC and the commentary by Judith Sihombing support the argument that only a registered proprietor may apply to cancel a lien-holder's caveat.

F

[57] Counsel said that Derrick lacks *locus standi* as he is not the proprietor of the land and is not even a beneficial owner of the land. It was further submitted that Loh did not become a bare trustee for Derrick when the latter paid him RM60,000. In this

G regard, counsel said that the manner and the circumstances in which a vendor becomes a bare trustee of the land for the purchaser has been explained by the Federal Court through Edgar Joseph Jr, in *Borneo Housing Mortgage Finance Bhd v. Time Engineering Bhd (formerly known as Time Engineering Sdn Bhd)* [1996]

H 2 CLJ 561; [1996] 2 MLJ 12 where it was held that, "the contractual events which result in the vendor becoming a bare trustee of the land for the purchaser, is on completion of the sale and purchase agreement, that is to say, upon receipt by the vendor of the full purchase price, timeously paid and when the

I vendor has given the purchaser a duly executed, valid and registrable transfer of the land in due form in favour of the purchaser, for it is then that the vendor divests himself of his interest in the land.

[58] In the present case it is said that Derrick does not have in his hand a duly executed valid and registrable transfer of the property and that what Derrick has by virtue of the 2003 judgment is merely a right *in personam* for a contract but not a right *in rem*. In conclusion, counsel said that the 2003 judgment is only binding *vis-à-vis* Derrick and Loh and does not affect or bind Consolidated Credit in any way. In the circumstances counsel suggested that Derrick is not the beneficial owner of the land and so lacked the requisite *locus standi* to apply to have the lien-holder's caveat removed.

Findings (On *Locus Standi*)

[59] On the issue of *locus standi*, it is my considered opinion that the following factors are sufficient to clothe Derrick with the requisite *locus standi* to mount a challenge and impugn the lien-holder's caveat.

[60] First, Derrick is not a mere busy body with no interest in and over the property and is in fact the holder of an order of specific performance (the 2003 judgment) in his favour with respect to the property.

[61] Secondly, he had paid the purchase consideration of RM60,000 and the same was duly and unconditionally accepted by Loh.

[62] Thirdly, Derrick's second caveat was based on grounds which are unimpeachable as it incontrovertibly disclosed a caveatable interest over the property.

[63] Fourthly, Derrick's beneficial interest or ownership over the property may be predicated on the principle crystallised in *Temenggong Securities Ltd & Anor v. Registrar of Titles, Johore & Ors* [1974] 1 LNS 175; [1974] 2 MLJ 45, FC, which was reaffirmed by the then Supreme Court in *Yeong Ah Chee @ Yan Hon Wah v. Lee Chong Hai & Anor And 13 Other Appeals* [1994] 3 CLJ 20; [1994] 2 MLJ 614 that when the purchaser under a sale and purchase agreement of a piece of land has paid the purchase price in full to the vendor, the vendor henceforth holds the land as a bare trustee for the purchaser and the vendor no longer enjoys any beneficial interest to the land. As such, following that principle, after receipt of the full purchase consideration, Loh ceased to have an interest in and over the property and held it in trust for Derrick. In this regard, I should also mention that in

Chua Hee Hung & Ors v. QBE Supreme Insurance Bhd [1990] 1 CLJ 669; [1990] 1 CLJ (Rep) 49; [1990] 1 MLJ 480 the Supreme Court had observed as follows:

> In Peninsular Malaysia the law is clear, *viz*, the vendor after receipt of the full purchase price and surrender of possession of the lands to the purchasers are deemed to be bare trustees for the purchasers (see *Temenggong Securities Ltd & Anor v. Registrar of Titles, Johore & Ors*). In that case Ong Hock Sim FJ, speaking for and on behalf of the Federal Court, stated:
>
> > We are in agreement with the majority view in *Karuppiah Chettiar v. Subramaniam* [1971] 1 MLJ 116 where it was 'Held (1) in this case Mohamed Sharjudin having sold his entire interest in the land and received payment in full held the legal estate only as a bare trustee for the respondent (purchaser) who was the equitable owner".

[64] As such and based on the principles that may be distilled from the abovementioned cases, it is clear that once full purchase consideration has been received by the vendor, the vendor becomes bare trustee for the purchaser. Further, Derrick has been in occupation and possession of the property since 1970. On that analysis, and even if I were to accede to the view advanced by counsel for Consolidated Credit that only a registered proprietor may apply for cancellation of a lien-holder's caveat, I am of the view that Derrick may be regarded a proprietor in equity or a beneficial owner of the property, which gives him the requisite *locus standi* to apply to have the lien-holder's caveat cancelled.

[65] In any event, my primary view is that there is nothing in the language of s. 331(4) NLC which supports the submission made by counsel for Consolidated Credit that only a registered proprietor may apply for cancellation of a lien-holder's caveat which had been wrongly or improperly entered.

[66] In fact, it appears to me that s. 331(4)(b) NLC tacitly recognises that persons other than the registered proprietor may apply for cancellation of the lien-holder's caveat as it contemplates the grant of a remedy by way of compensation for any person or body who may have suffered loss and damage by the entry of the lien-holder's caveat and the court may order such compensation as may be necessary in the circumstances. Section 331(4)(b) reads as follows:

(4) Where the Court is satisfied that any lien-holder's caveat ought not to have been entered, or ought to have been withdrawn, it may order:

(a) the cancellation thereof by the Registrar; and

(b) if the entry or failure to withdraw has caused damage or loss to any person or body, the payment of compensation by the person or body at whose instance the entry was made or, as the case may be, by whom the withdrawal ought to have been effected.

[67] Thus, I do not agree that only a registered proprietor can avail himself of the remedy under s. 331(4) NLC for the cancellation of a lien-holder's caveat which ought not to have been entered. As for the commentary by Judith Sihombing, I do not read it as suggesting that only a registered proprietor is entitled to apply for the cancellation of a lien-holder's caveat which ought not to have been entered. The author was merely emphasising that a registered proprietor can apply to cancel a lien-holder's caveat if it had been improperly entered or one entered properly but no longer needed and that the registered proprietor must prove that he suffered actual loss. The author did not go so far as to say that others may not apply to have the lien-holder's caveat cancelled.

[68] To my mind, the writer of the article has not expressly or implicitly suggested that others who are adversely affected by the presence of a lien-holder's caveat may not apply to have it cancelled. Also, it is obvious that she has not considered s. 331(4)(b) NLC and the possibility of the court making an order for payment of damages against the party who entered the lien-holder's caveat in favour of any person or body affected by the presence of the lien-holder's caveat. I am therefore unable to accept the argument that s. 331(4) NLC is only available as a remedy for registered proprietors.

[69] In the result, I was not convinced that there was any merit in the argument that only a registered proprietor is entitled to apply to court to have the lien-holder's caveat cancelled. As such, I had no hesitation in dismissing the objection raised and ruled that, for the reasons as above-stated, Derrick had the requisite *locus standi* to make the application to have the lien-holder's caveat cancelled.

A **Issue: Whether There Was A Deposit Of Title By Loh In 1998**

[70] As was rightly submitted Mr Robert Lazar, counsel for Derrick, the onus was on Consolidated Credit to prove satisfactorily to this court that Loh had indeed deposited the title with Consolidated Credit in 1998 as security for loans granted by the latter to the former. The starting point in this analysis is the statutory provision which gives rise to the creation of the statutory lien in the first place. In so far a creation of a lien is concerned, it was submitted by counsel for Derrick that the requirements under s. 281 of the NLC in respect of the creation and entry of a valid lien-holder's caveat had not been complied with by Consolidated Credit.

Section 281(1) of the NLC reads as follows:

> 281. Creation and effect, of liens
>
> (1) Any proprietor or lessee for the time being may deposit with any other person or body, as security for a loan, his issue document of title or, as the case may be, duplicate lease; and that person or body:
>
> (a) may thereupon apply under Chapter 1 of Part Nineteen for the entry of lien-holder's caveat; and
>
> (b) shall upon the entry of such a caveat, become entitled to a lien over the land or lease.
>
> (2) Where the holder of any lien has obtained judgment for the amount due to him thereunder, he shall be entitled to apply to the Court for, and obtain forthwith, an order for the sale of the land or lease.

[71] It is relevant to observe that that section deals with not just the entry of a lien-holder's caveat but is in fact the enabling statutory provision which gives rise to the coming into force of a statutory lien. It is the section, which if complied, creates a statutory lien. Hence, following that section, the party holding the title as security for a loan obtains a statutory lien, only upon entry of a lien-holder's caveat. Paradoxically, this point becomes acutely relevant when considering the remedies available to a person claiming to have a lien in equity. For now, I would say quite emphatically that the single most essential fact that must be established by Consolidated Credit is that there was a deposit of

title by Loh (the registered proprietor) to the lender (Consolidated Credit) coupled with an intention on the part of the registered proprietor (Loh) when depositing the title that it be held as security for a loan. In this regard, the factual narrative relied upon by Consolidated Credit in order to prove that there was a deposit of the title to the property is as follows:

(a) Consolidated Credit is a company incorporated under the Companies Act 1965 and licensed money lender under the Moneylender's Act 1951. Consolidated Credit had from 1998 to 2006, given loans for a total sum of RM7,378,693 ("the said Loan") to Loh. Loh had through his letter dated 29 March 1998 (p. 1 bundle B) deposited the original title to the property as a security for the said Loan.

(b) Consolidated Credit had on 3 May 2007, through their solicitors, Messrs Rajen & Lim issued a notice of demand against Loh demanding for a sum of RM7,378,695 being the outstanding amount due and owing under the said loan. I should add at this juncture that when the letter of demand was sent to Loh, he was still managing director of Consolidated Credit.

(d) As a result of Loh's refusal to comply with the notice of demand dated 3 May 2007, Consolidated Credit entered a lien-holder's caveat *vide* presentation no. 7819/2007 on 5 June 2007 on the property in order to protect their interests.

(e) Thereafter, Consolidated Credit filed a civil suit against Loh in the High Court of Malaya at Penang *via* civil suit no. 22-346-2007 to recover the outstanding sum of RM7,378,695 and had on 20 July 2007 entered a judgment in default against Loh (p. 83 bundle B).

(f) Derrick had admitted during cross-examination on 13 September 2012 on the contents of his affidavits that he has no proof to support his allegations that there is a conspiracy between the Consolidated Credit and Loh to defraud. This is how he answered during cross-examination:

> Consolidated Credit's counsel: I put it to you that in your affidavit affirmed on 2/6/2008, you have not produced any proof of conspiracy to defraud?
>
> Derrick Edwin David: Yes. I agree.

[72] On the other hand it was submitted by counsel for Derrick that Consolidated Credit had not complied with the requirements under s. 281 of the NLC and hence, were not entitled to lodge the said lien-holder's caveat against the property, having regard to the following:

(i) Both Loh (through his letter dated 29 March 1998 at p. 1 bundle B) and Consolidated Credit say that the title to the property was deposited by Loh with Consolidated Credit on 29 March 1998.

(ii) Consolidated Credit was and is a family company, the shareholders of which are the children and wife of the late Loh. At that material time, Loh was the managing director and he only resigned from that position on 22 May 2007 (see: p. 123 bundle B).

(iii) Derrick's counsel submitted that, there is no independent evidence or any judicial determination that Loh did in fact deposit the title with Consolidated Credit. The letter dated 29 March 1998 at p. 1 of bundle B could not have enclosed the issue document of title found at pp. 2-6 of the same bundle, as that title (in computerised form) was only issued on 7 July 2006.

(iv) It is pertinent to note that Laurence Loh in his affidavit in reply of 23 June 2008 at para. 4(b) (pp. 137-138 bundle A) suggests that that very document was deposited under cover letter of 29 March 1998 (p. 1 of bundle B) but the title which allegedly accompanied that letter was never produced.

(v) The title that was produced in bundle B is a replacement title which is a computerised version and issued on 7 July 2006 (see: pp. 2-6 of bundle B).

(vi) Indeed, a copy of the title existing as at March 1998 (when the title was allegedly handed over by Loh to Consolidated Credit) was never produced in these proceedings. As such, the title at pp. 2 to 6 of the core bundle cannot be the title that was allegedly deposited in 1998.

[73] In this regard, it was emphasised by counsel for Derrick that the trial of the High Court action by Derrick against Loh (the 2000 suit) commenced on 8 January 2003 and judgment was delivered on 13 November 2003 and Loh made no mention whatsoever during his testimony that the title to the property had

been deposited with Consolidated Credit in 1998 as security for loans. Also the fact as to the deposit of the title as security for loans was not all alluded to in the defence filed by Loh in those proceedings.

[74] In the circumstances, counsel for Derrick made the point that it is highly unlikely and inherently incredible for the title to the property to have been deposited with Consolidated Credit as security as this was not referred to either in the pleadings and neither did Loh allude to this when he gave evidence in 2003.

[75] The next piece of telling evidence that was referred to by counsel for Derrick in his attempt at persuading the court to hold that there was no deposit of the title in 1998 was the balance sheet for the accounts of Consolidated Credit for the year ending 31 December 1998 (see: p. 29 of bundle B) which showed an amount of RM7,345,840 owing by a director (having been reduced from RM8,400,840 of the previous year) and the note 8 (p. 36 of bundle B) which clearly says:

> The amount owing by a director is unsecured, interest-free and has no fixed terms of repayment.

[76] Significantly, Loh had signed the statement by Directors confirming the accounts as giving a true and fair view of the state of affairs of the company as at 31 December 1998. Loh also signed the statutory declaration as the director "primarily responsible for the financial management" of Consolidated Credit. (see p. 27 bundle B).

[77] The importance of this lies in the fact that Loh himself had attested to the fact that the loan to the director was unsecured and this therefore repudiates any suggestion that the title to the property was deposited as security in March 1998 in which case the loan would be a secured loan rather than an unsecured loan.

[78] Also, I was referred to the balance sheet for the accounts of Consolidated Credit for the year ending 31 December 2005, wherein the amount owing by a director (see: p. 48 of bundle B) is RM7,712,102 and note 7 is in the same terms (see: p. 63 of bundle B). The directors who signed the statement by directors were Nigel Loh Kwong Weng and Laurence Loh Kwong Yu. Nigel Loh also signed the statutory declaration as the director primarily responsible for the financial affairs of Consolidated Credit (see p. 45 of bundle B).

[79] According to counsel for Derrick, even going by Consolidated Credit's own documents, an inference may be safely made that there was no deposit of the title to the property in 1998 as security for any loan that may have been granted by Consolidated Credit to Loh.

[80] Next, no good reason, indeed no reason whatsoever, has been advanced as to why it took Consolidated Credit over nine years (after the title was allegedly deposited with Consolidated Credit) to lodge the lien-holder's caveat.

[81] In response to this, it was submitted by counsel or Consolidated Credit that there was no inaction on their client's part and that they are entitled to enter a lien-holder's caveat at any time. They said that the nine-year delay is only a factor to substantiate Derrick's argument that there cannot be deposit of title. In short, it was urged upon me that I should not draw any adverse inference by reason of the inaction or non-action by Consolidated from about March 1998 to 5 June 2007, when (inexplicably) the lien-holder's caveat came to be registered one day after Derrick's second caveat was entered on 4 June 2007. I say inexplicable because it puzzled me as to what had impelled Consolidated Credit to enter a lien-holder caveat on 5 June 2007 exactly one day after Derrick's second caveat had been registered. Mr Rajen, co-counsel for Consolidated Credit said that the date was a matter of pure coincidence, whereas Mr Robert Lazar said that the timing was rather "curious".

[82] Next, in 2006, Loh applied for a replacement title for the property and other properties on the grounds that the titles had all been lost. In his statutory declaration affirmed on 15 March 2006 in support of the application for a replacement title, Loh said that the titles were lost from his possession, and that none of the titles were ever charged to any bank (see: p. 16 of bundle B). This is what Loh said in his statutory declaration:

> 1. Saya adalah tuanpunya tanah yang tersebut dibawah:-
>
> (a) ...
>
> (b) ...
>
> (c) ...
>
> (d) ...

(e) Geran (1st Grade) No. 3158 Lot No. 1064 Seksyen 2 Bandar Georgetown Daerah Timur Laut Pulau Pinang

(f) ...

(g) ...

(h) ...

(i) ...

2. Saya sesungguhnya mengatakan bahawa dokumen-dokumen hakmilik yang asal bagi tanah-tanah tersebut telah hilang dari simpanan saya. Saya telah berusaha untuk mencarinya, tetapi tidak dapat menemuinya.

3. Saya sesungguhnya mengatakan bahawa saya tidak mencagarkan tanah-tanah tersebut kepada mana-mana pihak bank atau menandatangani Perjanjian Jualbeli dengan mana-mana pihak untuk menjual tanah tersebut.

[83] In this regard, it is also significant that in a letter dated 12 November 2007 (see: p. 130 of bundle B) Messrs Rajen and Lim (solicitors for Consolidated Credit) said that:

We are instructed by our clients to state that on 29 March 1989 Loh Hoot Yeang has delivered the original Grant for Lot No. 1064, Seksyen 2, Geran No. Hakmilik 3158, Georgetown DTL, Pulau Pinang (hereinafter referred to as "the title deed") to Consolidated Credit Company Sdn Bhd as security for a loan. Somewhere in March 2006, Consolidated Credit Company Sdn Bhd informed Loh Hoot Yeang that they have misplaced the title deed and requested Loh Hoot Yeang to obtain a replacement title deed as security for the loan obtained.

We are further instructed by our clients that somewhere in July 2006, Loh Hoot Yeang delivered the replacement title deed to Consolidated Credit Company Sdn Bhd. On 3 May 2007, Consolidated Credit Company Sdn Bhd made a demand to Loh Hoot Yeang for the sum of RM7,378,695 being the outstanding loan but he failed to settle the said sum. On 5 June 2007, Consolidated Credit Company Sdn Bhd lodged a lien-holder's caveat over the property to effect a statutory lien pursuant to s. 281(1) of the National Land Code (1965).

We are also instructed by our clients that on 15/6/2007, Consolidated Credit Company Sdn Bhd. Commenced a suit against Loh Hoot Yeang claiming *inter alia* the sum of RM7,378,695. On 20/7/2007, the High Court of Malaya at

> Penang entered a judgment in default of appearance against Loh Hoot Yeang for the sum of RM7,378,695 and interest at 8% per annum from the date of judgment until the realization of the said sum and costs of RM225.
>
> We are now instructed by our clients to state that since the title deed was all the material times in the custody of Consolidated Credit Company Sdn Bhd, it had acquired a lien in equity over the property. Our clients' equitable interests are not affected by the private caveat lodged by your client. Moreover, whether your clients' rights have priority over Consolidated Credit Company Sdn Bhd's rights is an issue which has not been determined by the court. In the circumstances, Consolidated Credit Company Sdn Bhd, is not agreeable to deliver the title deed to your client.

[84] I would observe at this juncture that there is no paper trail to show that Consolidated Credit actually had the title and they misplaced it and then asked Loh to apply for a replacement. Instead what we have is Loh's statutory declaration saying that the titles for the property and other properties were with him all along and they were not charged to any bank and that he had lost them.

[85] Next, after the 2000 suit (and all appeals arising therefrom) between Derrick and Loh came to an end with the refusal of leave by the Federal Court on 21 March 2007, Derrick proceeded to perform his part of the order for specific performance by tendering payment as ordered by the court. It is not without significance that Loh unconditionally accepted payment and when pressed for delivery up of the title, his solicitors wrote a letter dated 17 March 2007 to Derrick's solicitors to say this:

> We refer to your client's request for the document of title to the subject property. Our client is still trying to come to terms with the dismissal of his application for leave. (see: p. 74 of Bundle B).

[86] To my mind, the letter from Loh's solicitors was very probably closer to the truth, in that it gave the impression that Loh was sulking or licking the proverbial wounds sustained in the legal battle-field and needed time to get over the defeat that he had suffered in the litigation. In other words, it is inconceivable that if the title had been deposited with Consolidated Credit in 1998 that in 2007, Loh could unequivocally and unconditionally accept the purchase consideration as ordered by the court

(pursuant to the 2003 judgment) and when pressed for delivery of the title, say nothing about the deposit of the title which had allegedly occurred about nine years prior to that date.

[87] It was accordingly submitted by counsel for Derrick that taking all of the above pieces or strands of evidence cumulatively and after making all the necessary and reasonable inferences, the singular or irresistible conclusion that ought to be reached is that the claim by Consolidated Credit that there was a deposit of title in 1998 is inherently incredible and ought to be rejected.

[88] On the other hand, Mr Paari Perumal said that a Registrar's caveat had been entered and this was premised on Derrick's allegation of fabrication, fraud, conspiracy – all of which has been demolished when Derrick was cross-examined. Derrick's allegation of fraud and fabrication are contained in his police report dated 26 November 2007 (see pp. 107-109 bundle B) wherein he had stated, *inter alia*, that:

> I have recently discovered that after accepting the payment of RM60,000.00 the said Loh Hoot Yeang had conspired with his children, namely Laurence Loh Kwong Yu and Nigel Loh Kwong Weng to fabricate documents so as to show that the title of the said property had been deposited with the family company known as Consolidated Credit Company Sdn Bhd and had caused the entry of a lien-holders caveat on the said property on 5/6/2007.

[89] Subsequently, the court had allowed limited cross-examination and Derrick was cross-examined on this allegation and he admitted that he could not prove these allegations. Hence, it was submitted for Consolidated Credit that the Registrar's caveat ought to be removed as there was no basis for its entry in the first place and that it was entered based on Derrick's fears, which have been proven as being unfounded. As far as Loh's statutory declaration on the loss of title and the contents of the audited accounts which state that the loans were unsecured, it was submitted that this court is not in a position to make any adverse findings because this can only be answered through *viva voce* evidence as there would be a need to go into the mind of the makers of the documents.

[90] Mr Paari Perumal rounded off by saying that allegations of fraud cannot be dealt with on affidavit evidence and that the fabrication of documents, as is being suggested by Derrick amounts to fraud, which cannot be determined on affidavit evidence.

[91] Mr Robert Lazar then said that the documents which his client is trying to impeach are documents generated by Loh and Consolidated Credit and that these are their own documents and Derrick is entitled to focus on the inherent infirmities which are unanswered in the affidavits.

[92] In the main, the documents in question are Loh's statutory declaration and audited accounts of Consolidated Credit. In particular, it was pointed out that even after litigation between Loh and Derrick was resolved by refusal of leave by Federal Court and tendering of RM60,000 to Loh's solicitor who encashed the cheque and when pressed for transfer documents, they said, their client was "coming to terms" which created the impression that he (Loh) needed time to accept the reality and right up to that point in time, there wasn't even a faint whisper that he had deposited the title with his own family run company which is an exempt money lending company.

[93] He added that Consolidated Credit, being an exempt money lending company, are not novices and they should have known how to protect their interest instead of waiting nine years to register lien-holder's caveat (assuming the title was indeed deposited in 1998).

[94] Mr Lazar also emphasised that Consolidated Credit did not intervene in the 2000 suit which culminated in the 2003 judgment, *albeit* that Loh was managing director at that time. In fact he remained as managing director of Consolidated Credit until 22 May 2007. He did not inform the court in the 2000 suit, that there was a lien in favour of Consolidated Credit. It was not even raised in the pleading. If raised it would have been a defence to a claim for specific performance. Apparently, the lien-holder's issue arose only during execution proceedings when Derrick tried to compel Loh to hand over title deed with an executed transfer form.

[95] According to counsel for Derrick, the only act that had to be performed is delivery up of the issue document of title ("IDT") (ie, replacement title). Counsel informed the court that the Court of Appeal had ordered the Registrar of the court to sign the relevant transfer form or memorandum of transfer ("MOT") and that that has already been done.

[96] Counsel submitted that in the current proceedings the court is only being asked to look at documents to determine the issue of deposit of title. He said that this does not give rise to the issue of fraud, which is separate.

[97] Derrick's previous grievance on that score is that looking at sequence of events, an inference may be made that it is an attempt to deprive him of the benefit of the fruits of the judgment. But the issue now is that whether it is on affidavit evidence or in documents, the fact remains that the documents are there and are unchallenged and the court is both entitled to and obliged to make a finding one way or the other, whether there was indeed a deposit of the title to the property by Loh in 1998.

Findings: Whether There Was A Deposit Of Title In 1998

[98] In my view, if there was a deposit of title in 1998, then it is curious as to why Consolidated Credit did nothing to protect their interest by ensuring that a statutory lien is created in accordance with the provisions of the NLC particularly as they are a moneylending company and ought to have known of the procedures necessary for the creation of a statutory lien and had ample opportunity to do so at various points in time when there was no caveat in place or during the window period when the caveat had lapsed and before the next one was filed.

[99] It is also curious as to why Consolidated Credit took no steps to remove Derrick's first caveat. If the title was with Consolidated Credit since 1998, then why did they not intervene in the 2000 suit between Derrick and Loh, when they knew or ought to have known (since Loh was managing director of Consolidated Credit) that the whole subject matter of the 2000 suit was the property and that any order in the suit in favour of Derrick would necessarily affect their rights as the holder of a lien in equity.

[100] I find it particularly telling that nothing was mentioned by Loh about the deposit of the title in the 2000 suit as that may or would have changed the whole equation of the suit in that Derrick may well have changed his litigation strategy and amended his claim and asked for damages instead of specific performance of the oral contract when the subject matter of the contract no longer existed. By remaining silent on this issue both during testimony

and in the pleadings, Loh (and by extension Consolidated Credit as well) have misled Derrick and the court hearing the 2000 suit that the subject matter of the suit was intact or at any rate that there was no impediment to the property being transferred to Derrick if he were to succeed in the suit.

[101] It is also curious that Loh said nothing about the deposit of title when Derrick had tendered payment of RM60,000 in March 2007. Also, since Loh had unconditionally accepted the purchase consideration in March 2007, it must mean that he intended for the sale and the transfer (as per the 2003 judgment) to go through. It is not without significance that the issue of deposit of title only surfaced when Derrick started proceedings to compel Loh to deliver the title to the property.

[102] Also, I note that Consolidated Credit has feigned ignorance of the 2000 suit by Derrick against Loh. They say *via* paras. 6(a) and 15 of the affidavit of Laurence Loh Kwong Yu (see pp. 183 and 185 bundle A) that they only came to know of the proceedings when they received a letter dated 23 October 2007 from Derrick's solicitors.

[103] To my mind this is wholly disingenuous especially when the person sued as defendant in the 2000 suit is none other than Loh who was at all material times the managing director of Consolidated Credit. It would be incredulous for Consolidated Credit to suggest that they were unaware of the proceedings between Derrick and Loh when the defendant in the suit was Loh, who was at the material time the managing director of Consolidated Credit. In the affidavits, Consolidated Credit appeared to suggest that they and Loh are separate legal entities. Presumably they took that position so that Loh's knowledge is not imputed to them. In my view, in such a situation such as this, one cannot automatically employ the separate legal entity principle and treat them as separate such that the knowledge of Loh cannot or is not to be imputed to Consolidated Credit.

[104] This underscored by the fact that Consolidated Credit is a family run company and Loh's knowledge of Derrick's claim as arising under the 2000 suit, must in the circumstances of this case be necessarily imputed to Consolidated Credit. It is obvious enough that the reason why Consolidated Credit took the position in their affidavit that they had no knowledge of the legal

proceedings between Derrick and Loh, is to first, distance themselves from the loop of knowledge of the proceedings as between Derrick and Loh and secondly and more importantly, to deflect any suggestion of inaction and/or dilatoriness on their part for almost nine years since the alleged deposit of title in 1998.

[105] Next, in so far as the audited accounts of Consolidated Credit are concerned I note that in para. 6(vii) of Derrick's affidavit (p. 164 of bundle A) and para. 6(ix) (p. 165 of bundle A) the issue as to the loans being described as "unsecured" was clearly raised by Derrick. But the response that came from Consolidated Credit on this issue hardly qualifies as an explanation and was meekly couched as follows:

> I deny paragraph 6(vii) of the Applicant's Affidavit in Reply and state that the 2nd Respondent had taken a loan from 1998 to 2006 in the sum of RM 7,378,695 from the 3rd respondent and that the issue document of title had been deposited with the 2nd Respondent as security for the loan. (see p. 184 of Bundle A).

[106] In my view, there is nothing in that paragraph which explains why the audited accounts of Consolidated Credit had treated the loan to a director as "unsecured". I do not know whether Consolidated Credit had an explanation to offer as regards the audited accounts. For present purposes, I can only deal with the documents and the affidavits as they have been presented to the court. From what I could gather, they have not offered any credible or any explanation as to why the audited accounts which had been signed off by Loh (for the 1998 accounts) and later by Nigel Loh Kwong Weng (for the 2005 accounts) declared the loan to a director as "unsecured", which can only mean that there was no security provided for the loan and by parity of reasoning that there was no deposit of title as claimed by Consolidated Credit.

[107] I might add that the audited accounts are all documents which form part of statutory filings under the Companies Act 1965 and related rules and regulations thereunder and as such, the contents of the documents that have been filed with the statutory authority must be accepted as being true and accurate. If there is any mistake or error then there must be efforts or steps taken to file corrective documents to reflect the true state of affairs. Otherwise it will be a situation where the statutory filing says one thing and other documents (not being part of the

statutory filing) saying quite the opposite thing. So in this case, Consolidated Credit's affidavits which assert that in 1998 there was a deposit of title as security for loans by them to Loh is patently contradicted by their own statutory filing by way of the audited accounts.

[108] It is axiomatic that the contents of statutory filings such as audited accounts must be true and accurate in every respect and therefore taken as the gospel truth as regulatory authorities, creditors, investors, shareholders and the public in general will be relying upon the correctness of what is stated therein for their own specific and particular purposes. It goes without saying that one of the essential purposes of statutory filings is to ensure transparency and openness of the financial affairs of the company. It follows that it would be in the most exceptional of circumstances that the company would or should be allowed (particularly in legal proceedings) to take a position which is different from that which has been stated in the statutory filing. Even then one would expect that a satisfactory and credible explanation is proffered in respect of the discrepancies in the statutory filing so as to explain any obvious disconnect between what has been stated in the statutory filing and what has been asserted in other documents, including but not limited to court documents. As I said, in the present case, there is no explanation whatsoever by those who are running Consolidated Credit as to why the so-called loan to a director as reflected in the 1998 and 2005 audited accounts were declared as "unsecured".

[109] Of course, I am mindful of the fact that any ruling that I make as regards the non-existence of a deposit of title to the property in 1998 would mean that I have rejected Consolidated Credit's averments to the effect that there was such a deposit by Loh in 1998. Also it would mean that the letter dated 29 March 1998 (p. 1 of bundle B) has been impugned. All of these would cumulatively mean that I have arrived very dangerously close to the allegation of fabrication, which Derrick has said under cross-examination that he has no proof.

[110] But the question ultimately is whether I can or should nevertheless proceed to determine the issue of whether there was in fact, a deposit of title to the property by Loh in 1998. In my view, there is no impediment for this court to arrive at an appropriate conclusion after scrutinising and making a qualitative

analysis of all the materials (affidavits and exhibits) that have been presented to the court. Hence, merely because Derrick has said under cross-examination that he has no proof of fabrication by Loh and his children and/or because the issue is contentious and has been taken up *via* affidavits instead of *viva voce* evidence, does not mean that in every case, the court should refrain from making a determination of an issue, regardless of whether the evidence is compelling and/or conclusive or otherwise.

[111] Hence, if there is compelling and conclusive evidence touching upon a particular issue, then it would not be inappropriate for a court to make a determination on that issue. In fact, I would go so far as to say that if a court refrains from dealing with and/or from making an assessment and conclusion on that issue, then it may be bordering on abdication of judicial duty, responsibility and function. In this regard, it would be appropriate to quote from the case of *Hock Hua Bank (Sabah) Bhd v. Yong Liuk Thin & Ors* [1995] 2 CLJ 900; [1995] 2 MLJ 213 CA where Justice Gopal Sri Ram said:

> Now, nothing that was said by this court in *Keet Gerald* is to be taken as detracting from the right, and indeed the duty, of a judge, in appropriate cases, to undertake a qualitative analysis of the affidavit evidence presented before him. In a case like the present, I can do no better than to adopt the words of Lee Hun Hoe CJ (Borneo) in *Syed Ibrahim bin Syed Abdul Rahman v. Liew Su Chin* [1984] 1 MLJ 160 where he said [at p 163 col 2 G-H]:
>
> > The onus of the caveator, prompted by the analogy with interlocutory injunction, is that before any question of balance of convenience can arise the party seeking the injunction must satisfy the court that his claim is neither frivolous nor vexatious in other words that the evidence before the court discloses a serious question to be tried. Not all disputes of fact necessarily raise serious questions to be tried. It is of course quite right to say that it is undesirable to resolve disputes on affidavit evidence. Yet judges are expected in applying the test to be critical of the affidavit evidence which must on the face be at least plausible.
> >
> > Although the views expressed by His Lordship the Chief Justice of Borneo were in the context of an application to remove a caveat, they are, I think, of general application. Whenever a court is required to judicially appreciate affidavit evidence, it is a necessary adjunct of that function to

A ascertain whether allegations made are inherently improbable or inherently incredible or patently inconsistent with contemporaneous documents. Whether such an analysis ought to be undertaken depends upon the jurisdiction the court is exercising and, more importantly, upon the particular facts of a case.

B

[112] Also, there is judicial precedent to demonstrate that a court can determine on affidavits, the issue as to whether there was a deposit of title with the intention that it was to be held as security for a loan. In this context it is relevant to highlight the following C observation made by His Lordship Haji Mohd Noor bin Hj Ahmad H in *Minang Bina Sdn Bhd lwn. Yahya Mohd Said & Yang Lain* [1992] 1 CLJ 70 [1992] 1 CLJ (Rep) 503:

D Juga, jelas bahawa kaveat pemegang lien itu dimasukkan oleh Plaintif-plaintif lebih kurang 1½ tahun selepas geran tanah diserahkan kepada plaintif-plaintif iaitu selepas defendan-defendan memberitahu cadangan mereka hendak membatalkan perjanjian itu. Sekiranya benar yang geran itu telah didepositkan sebagai jaminan bagi pinjaman wang, sudah tentu Plaintif-plaintif akan mengambilnya dan memasukkan kaveat pemegang lien itu terlebih E awal lagi. Mengapakah Plaintif-plaintif menunggu sebegitu lama tanpa berbuat apa yang sepatutnya dibuat bagi memeliharakan kepentingan mereka? ... (see p. 507 of the judgment)

[113] His Lordship continued:

F Dari apa yang dikatakan di atas, bolehlah disimpulkan bahawa geran tanah itu tidak didepositkan kepada Plaintif-plaintif sebagai jaminan bagi satu pinjaman wang dan tidak wujud niat bagi mengujudkan satu lien. Sebaliknya, kaveat pemegang-lien itu dimasukkan, apabila Plaintif-plaintif mengetahui yang perjanjian akan G ditamatkan oleh Defendan-defendan, bertujuan untuk membantutkan rancangan Defendan-defendan selanjutnya di atas tanah tersebut ... Oleh yang demikian, saya berpuashati bahawa Plaintif-plaintif gagal membuktikan yang kemasukan kaveat pemegang-lien itu telah dibuat betul-betul mengikut kehendak-kehendak undang-undang (see p. 507 of the judgment)

H

[114] In the abovementioned case the court ruled that the title had not been deposited with the intention that it be held as security. In the present case, my task is to determine whether there was a deposit of title. What I also find interesting and I helpful from that case is that the learned judge had come to the conclusion that the titles to the property were not handed over

as security for a loan and he reached this conclusion based on affidavit evidence and the documentary evidence tendered by way of exhibits to the affidavits that were placed before him. This is what he said at p. 505 of the judgment:

> Selepas meneliti affidavit masing-masing, atas imbangan kemungkinan, saya rasa versi defendan-defendan kecuali tentang amaun bayaran yang telah dibuat oleh plaintif-plaintif kepada defendan 1, boleh dipercayai, atas alasan-alasan berikut ...

[115] I have touched on this only because counsel for Consolidated Credit placed much emphasis on Derrick's testimony during cross-examination on his affidavits where he had said that he could not prove that Consolidated Credit had committed fraud. Hence, it was suggested during submissions that in light of Derrick's answers during cross-examination, this court should not see anything sinister in the assertion by Consolidated Credit that the title to the property was handed over to them by Loh and to be held by them as security for the loans granted by them to Loh.

[116] On the other hand, counsel for Derrick stayed clear of the fraud issue as that was obviously a perilous course to take in an application of this nature where the issues are to be determined on affidavits. Of course, in this case, Derrick was cross-examined and he gave his answer on the fraud/fabrication issue. Basically he admitted that he was not able to prove that Loh had conspired with his children to defeat his claim by virtue of the 2003 judgment that was made in his favour. But the question that Derrick has raised is this: whether there was indeed a deposit of title in 1998. It is a factual question.

[117] Consolidated Credit say that I should not enter into that question as the issue is foreclosed by the answer that Derrick had given previously during cross-examination. However, I was not convinced that I cannot deal with the issue merely because Derrick had given an answer that eliminates conspiracy and fraud/fabrication from the equation. The issue here is a simple one. As Mr Robert Lazar for Derrick puts it, the issue with regards to whether there was a deposit of title is different and separate from the fraud and conspiracy issue. Mr Lazar says that he has stayed clear of the fraud issue and is focusing on the issue of whether factually there was a deposit of title by Loh in 1998.

[118] Of course, I accept that fraud cannot be determined on affidavit evidence unless perhaps there is an unequivocal admission of it by the fraudster. But here, I am not dealing with fraud and am confining this curial exercise to the factual question as to whether Loh had in fact deposited the title to the property with Consolidated Credit in 1998.

[119] The view I take is that this court is not precluded from determining the question as to whether there was indeed a deposit of title in 1998. To me it is a threshold issue and an evidential one at that. To conclude on this point, it is my opinion that Derrick's answers during cross examination that he is unable to prove fraud against Loh does not prevent this court from determining the factual question as to whether Loh did indeed deposit the title with Consolidated Credit as security for loans granted by the latter to the former.

[120] I therefore took the view that ultimately it all boils down to the quality and credibility of the evidence that is presented to the court. In this case, the evidence was presented by way of affidavits. And so my task was to determine as best as I could and to reach a conclusion as to whether Consolidated Credit's assertion of there being a deposit of title in 1998 is a credible one. Put in another way, the task of the court was to critically examine and analyse the various affidavits and determine whether Consolidated Credit's assertion, on affidavit, that there was a deposit of title was a credible one or whether it was inherently incredible. If I am convinced that there was no deposit of title in 1998, then the entire lien-holder argument falls.

[121] So the critical question that remains is whether there was a deposit of title by Loh to Consolidated Credit in 1998. In my view, there are enough strands of evidence which when taken together and examined cumulatively and critically analysed, negates or vitiates the probability of a deposit of title to the property by Loh to Consolidated Credit in 1998. The strands of evidence may be recapitulated as follows:

(i) Consolidated Credit's inaction, meaning failure to enter a lien-holder's caveat, from about March 1998 until 5 June 2007 and in particular during the window period when there was no private caveat in place, is curious apart from being unexplained. The response or position taken by

Consolidated Credit that they are entitled to lodge a lien-holder's caveat at any time is no answer to the question as to why they did nothing until the date when the lien-holder's caveat was entered on 5 June 2007. Also, their inaction includes but is not limited to their failure to apply to remove Derrick's first caveat, which was entered on 26 February 2000;

(ii) If the title was deposited with them in 1998, then I would have expected Consolidated Credit to intervene in the 2000 suit when they would have known (through Loh) about the nature of Derrick's claim and the impact that it would have on their rights as a holder of a lien in equity (assuming the title was with them);

(iii) The statutory declaration by Loh when he applied for replacement titles unequivocally states that the title to the property was with him all along and that he had never charged it to any bank;

(iv) The letter from Messrs Rajen and Lim dated 12 November 2007 (solicitors for Consolidated Credit) (see: p. 130 of bundle B) which purports to explain that the title was with Consolidated Credit since 1998 and went missing when it was in their custody and that it was their client who had asked Loh to apply for a replacement title, is not at all backed by any contemporaneous documents and in fact contradicts Loh's statutory declaration;

(v) The audited accounts for Consolidated Credit (1998 and 2005) which had been signed off by Loh and his son Nigel Loh respectively as the directors primarily responsible for the financial affairs of the company, clearly and unequivocally state that the loan to the director is unsecured which can only mean that the title was never deposited with Consolidated Credit in 1998;

(vi) Although Derrick had referred to the audited accounts in his affidavit and pointed out that the loan to the director was declared therein to be unsecured, there was no explanation whatsoever from Consolidated Credit in its reply affidavit. As such, the declaration in the audited accounts for the years 1998 and 2005 that the loan to the director was unsecured remains intact and extant;

(vii) Loh (whilst managing director of Consolidated Credit) unconditionally accepted the payment of RM60,000 which was made by Derrick in March 2007 being the full purchase consideration for the purchase of the property, without saying anything about the alleged deposit of title in 1998. All he said was that he was "coming to terms" with the Federal Court's refusal of his application for leave to appeal;

(viii) Loh (although he was managing director of Consolidated Credit) as the defendant in the 2000 suit, said nothing about any deposit of title either in his evidence or in his defence; and

(x) Throughout the currency of the 2000 suit and the appeal to the Court of Appeal and the leave application to the Federal Court, Consolidated Credit (and/or Loh as its managing director) did not give any notice to Derrick as to any deposit of title by Loh in 1998.

[122] In the result, it is my view that based on all of the above facts and circumstances and having due regard to the overall probabilities of the case, it is more probable than not that there was no deposit of title in 1998. With this ruling, the whole substratum of the application by Consolidated Credit falls. However, for completeness (and in the event that my conclusion herein of no deposit of title is held to be wrong), I have gone on to consider all the other issues on the assumption that there was a deposit of title by Loh. Hence, all further issues that are discussed hereinafter are premised only on an assumption of deposit of title, whilst my ruling itself is that there was no deposit of title.

Issue: Whether The Lien-holder's Caveat Entered By Consolidated Credit On 5 June 2007 Is Valid

[123] It is not in dispute that the second caveat by Derrick was registered on 4 June 2007 and the lien-holder's caveat registered on 5 June 2007. The relevant statutory provision under the NLC relevant to the issue as to validity of the lien-holder's caveat are s. 322(2) NLC which read with s. 330(3) NLC which expressly prohibits the endorsement or entry on the register document of title of any lien-holder's caveat, and that the Registrar is expressly

prohibited from entering a lien-holder's caveat on the register document of title 'by any Registrar's caveat, private caveat, trust caveat or prohibitory order'. The relevant sections of the NLC are reproduced as follows:

Section 322 NLC

(1) A caveat under this section shall be known as a "private caveat", and:

(a) may be entered by the Registrar on the register document of title to any land at the instance of any of the persons or bodies specified in section 323;

(b) shall have the effect specified in sub-section (2) or (3), according as it is expressed to bind the land itself or an undivided share in the land or merely a particular interest therein.

(2) The effect of any private caveat expressed to bind the land itself or an undivided share in the land shall, subject to sub-sections (4) and (5), be to prohibit so long as it continues in force the registration, endorsement or entry on the register document of title thereto of:

(a) any instrument of dealing executed by or on behalf of the proprietor thereof, and any certificate of sale relating thereto;

(b) any claim to the benefit of any tenancy exempt from registration granted by the said proprietor; and

(c) any lien-holder's caveat in respect thereof.

[124] Also s. 322(6) of the NLC is relevant as it directs the Pendaftar Hak Milik or Registrar of Land Titles to reject any lien-holder's caveat if there is already a private caveat which had been lodged in respect of the property. Section 322(6) NLC reads as follows: "Where the registration of any instrument, or the endorsement or entry of any claim or lien-holder's caveat is prohibited by any private caveat, the Registrar shall reject the instrument or, as the case may be, application for endorsement or entry."

[125] Next, it is necessary to consider s. 330 of the NLC. It reads as follows:

> Section 330: Creation and effect of lien-holders' caveats
>
> (1) Any person or body with whom the issue document of title to any land, or any duplicate lease, has been deposited as security for a loan may, as provided in section 281, apply to the Registrar under this section for the entry of a lien-holder's caveat in respect of the land or lease in question.
>
> (2) Any such application shall be in Form 19D, duly attested in accordance with the provisions of section 211, and shall be accompanied by the prescribed fee, and the issue document of title or, as the case may be, duplicate lease.
>
> (3) The Registrar shall note on any such application the time at which it was received (being, in the case of any application sent by post, the time at which it was withdrawn from its cover in the Registry or, as the case may be, Land Office) and, unless he is prohibited from doing so by any Registrar's caveat, private caveat, trust caveat or prohibitory order, shall as soon as may be thereafter.

[126] Hence, it is clear from the abovementioned statutory provisions that there could be no endorsement or entry of the said lien-holder's caveat on 5 June 2007 and Consolidated Credit is prohibited from entering the said lien-holder's caveat over the property, as at the material time, the property was already subject to the private caveat entered by Derrick on 4 June 2007 (ie, the second caveat).

[127] In *Woon Kim Poh v. Sa'amah Hj Kasim* [1986] 1 LNS 45; [1987] 1 MLJ 400, His Lordship Hashim Yeop A Sani had, in delivering judgment for the Supreme Court, explained the effect of the entry of a private caveat as follows:

> Under Section 322 of the National Land Code so long as a caveat is in force registration, endorsement or entry on the register document of title of any instrument of dealing shall be prohibited. The effect of a private caveat expressed to bind the land itself is to prevent any registered disposition of the land except with the caveator's consent until the caveat is removed ... In the Torrens system where registration is the very basis of the system *the prohibition in section 322(2) must be strictly complied with. In other words the Registrar is statutorily obliged to refuse the registration because to do so would be a violation of an expressed provision of the National Land Code.* (emphasis added)

[128] The Court of Appeal had, in *Lee Chin Cheng Dengkil Oil Palm v. Kaplands Sdn Bhd* [2002] 4 CLJ 753; [2003] 1 MLJ 177, applied the rationale of His Lordship Hashim Yeop A Sani in the *Woon Kim Poh* case, and had further added that the effect of a private caveat is to 'freeze the register at least until the caveat is removed'.

[129] More relevantly, in *The HongKong & Shanghai Banking Corporation v. Hj Salam Hj Daud & Ors; RHB Bank Bhd (Intervenor)* [2002] 4 CLJ 659 ("*HSBC* case"), which was a case involving a challenge to the validity of the lien-holder's caveat, His Lordship Justice Ramli Ali (as he then was), applied the rationale of His Lordship Hashim Yeop A Sani, and said:

> ... lien-holder's caveat is also invalid in law on the ground that the said caveat was registered on 2 September 1992, when in fact the defendant's private caveat had been registered on 27 May 1992 and was still in force. Section 322(2)(c) of the NLC expressly prohibits the entry of any lien holder's caveat over the land so long as there is private caveat in force ...
>
> In fact, under s 322(6) of the NLC, the registrar is required to reject the lien-holder's caveat where there is a private caveat in force. Section 331(4) of the NLC further provides that the court, if satisfied that any lien-holder's caveat ought not to have been entered, may order the cancellation thereof by the registrar.

[130] As I mentioned earlier, Derrick had lodged a total of three private caveats. The relevant caveat which became the focus of the submissions is the second caveat which was entered on 4 June 2007 and lapsed on 3 June 2013. It was submitted by Mr Paari Perumal for Consolidated Credit that second caveat was the only impediment and with the lapse of Derrick's second caveat on 3 June 2013 whatever shroud of doubt surrounding the lien-holder's caveat is clear and the lien-holder's caveat is unimpeachable.

[131] Mr Paari Perumal submitted that the statutory lien became good and effective because the impediment which existed as at 4 June 2007 (ie, the second caveat) had extinguished. He said that his client had cleared the threshold by virtue of the lapse of the 4 June 2007 caveat. In response, Mr Robert Lazar said that s. 331(4) uses the words "ought not to have been entered" or "ought to have been withdrawn" and that this a threshold issue – ought not to have been entered. According to counsel, whatever happened after that date does not affect Derrick's position unless

A he did something to prejudice his private caveat and there was no suggestion that Derrick had done anything to prejudice his private caveat and that it is only by operation of law and because of passage of time that the second caveat lapsed.

B **[132]** Counsel for Derrick said that if the other side are right in the point they have raised then every time a case takes more than six years to be disposed of, various legal proceedings will be affected by sheer passage or effluxion of time. He said that parties have to confine themselves to the position that obtained as at C 5 June 2007 when the statutory lien was created contrary to s. 330(3) NLC. He said that because of the words "ought not to have been entered", the lien-holder's caveat was a nullity as at 5 June 2007 and that Derrick's application *via* the OM must necessarily relate back to the state of affairs as at 5 June 2007. D He concluded by saying that the effect of Derrick's private caveat which was entered on 4 June 2007 as per s. 322 (2) NLC is to prohibit any subsequent registration or entry of lien-holder's caveat and that s. 330(3) NLC has to be read in harmony with s. 322(2) NLC.

E **[133]** I am inclined to agree with counsel for Derrick. The matter has to be determined on the basis of the facts as obtained as at 5 June 2007 and should not be based on subsequent events such as the lapse of the private caveat on 3 June 2013. It is material F to note that this case was initially heard before another Judicial Commissioner on 23 January 2013 and judgment was due to be delivered thereafter. However, before the Judicial Commissioner could deliver a decision he resigned and the case had to be heard afresh on 9 September 2013 by which time the second caveat had G lapsed. Therefore, it was through no fault of the parties that this case came to be concluded only on 9 September 2013.

[134] But, if the argument advanced by counsel for Consolidated Credit is to be accepted then that would mean that if the case were disposed off before 3 June 2013, then the factual considerations H (and by extension the outcome) would or should be different.

[135] With all due respect, I am unable to agree with the submission made that the lapse of the second caveat on 3 June 2013 had wiped the slate clean and validated the lien-holder's I caveat as at 5 June 2007. As such, we are back to the point about the lien-holder's caveat having been improperly entered. As

I said earlier, by virtue of s. 322(6) NLC the Registrar ought to have rejected the lien-holder's caveat. Somehow, the lien-holder's caveat came to be registered on 5 June 2007.

[136] In my view, what matters is whether in view of the presence of Derrick's second caveat which had been registered on 4 June 2007, the lien-holder's caveat registered on 5 June 2007 is invalid and a nullity. To me the point is unarguable and the principle that was elucidated in the *HSBC* case to the effect that the presence of a private caveat vitiates the entry of a lien-holder's caveat entered subsequently, applies with equal force to the present case. In the circumstances, following the *HSBC* case, it is plain that the entry of the said lien-holder's caveat on 5 June 2007 subsequent to the private caveat entered on 4 June 2007 on the registered document of title is clearly in breach of s. 322(2) of the NLC read with s. 330(3) of the NLC, and is therefore in law a nullity. I am accordingly impelled to the view that in the present case, Consolidated Credit's lien-holder's caveat which was registered on 5 June 2007 contravened s. 330(3) NLC read with s. 322(2) NLC. In the result, I am of the opinion that the lien-holder's caveat lodged by Consolidated Credit was improperly entered or ought not to have been entered and was invalid and a nullity.

Final Issue: Whether There Was A Lien In Equity

[137] I will now deal with the final issue and that is, whether notwithstanding that there is no valid statutory lien, Consolidated Credit acquired a lien in equity based on the (assumed) fact that there was a deposit of title in 1998. This point was argued by counsel for Consolidated Credit as an alternative to the main argument and it was accordingly submitted that even if the lien-holder's caveat dated 5 June 2007 is impugned, they nevertheless had a lien in equity over the property which overrides and takes precedence over the interest of Derrick as a holder of an order for specific performance or as a party who had paid the full purchase consideration to the vendor.

[138] Counsel for Consolidated Credit submitted that the NLC did not abrogate rights or interests in equity. Of course this submission (on lien in equity) can only be sustained if there is a finding of fact that the title was deposited with Consolidated Credit in March 1998. As I have said earlier in this judgment, the

A view that I have taken is that there was no deposit of title by Loh in March 1998. However, I am compelled to consider the issue of lien in equity in the event that my conclusion of no deposit of title is found to be erroneous. It is on that premise that I am now considering the issue of lien in equity.

B

[139] The starting point in counsel's submission was the case of *Vallipuram Sivaguru v. P C R M Palaniappa Chetty Official Administrator as Administrator of the Estate of Gan Inn, Deceased* [1936] 1 LNS 69; [1937] 1 MLJ 59 ("*Sivaguru*'s case") where the C facts were that in 1931, G deposited his issue document of title to land with the first defendant-respondent as security for a loan and in 1932 sold the same land to N explaining the absence of the issue document of title by a false statement that it was lost. On account of the absence of the issue document of title N could D not obtain registration of the transfer on sale and in consequence lodged a caveat against the land under s. 166 of the Land Code. G died in 1932, shortly after executing the transfer in favour of N, and in 1933 the first defendant-respondent lodged a caveat under s. 134 of the Land Code claiming a lien by deposit with E him of the issue document of title. At the end of 1933, N executed a transfer of this land in favour of the plaintiff-appellant and N died in June, 1934. In August, 1934, this land was transmitted to the second defendant-respondent as administrator of G's estate. The court held that the first F defendant-respondent had acquired, by the deposit with him of the issue document of title, an equitable right to a lien over the land by registering at any time a caveat under s. 134 of the Land Code (Cap. 138).

G **[140]** The court further went on to hold that as between the first defendant-respondent and the plaintiff-appellant the former had the prior equity and that his delay in presenting his caveat for registration was not an omission which operated and enured to forfeit and take away his pre-existing equitable title. This is how H the court specifically dealt with the creation of an equitable right to a lien subsisting outside of the Land Code:

> ... It is true that section 134 (i) of the Land Code states specifically that no lien is created until a caveat is registered. Before the amending Enactment No. 31 of 1928, the lien was I created by the mere fact of deposit, and it may have been the intention of the legislature to put an end to equitable liens such as had hitherto been recognised. But, in the absence of express

words, the Courts will not be precluded from doing justice between parties by giving effect to equitable rights by way of contract. I take it therefore that the only effect of the amendment is that no lien is acquired under the Land Code until the caveat is registered but that does not prevent the depositee of the document of title from having some equitable right outside the Land Code, and such right is as stated above. (see p. 60 of the judgment).

[141] Next counsel relied upon the case of *Mercantile Bank Ltd v. The Official Assignee of the Property of How Han Teh* [1969] 1 LNS 106; [1969] 2 MLJ 196. In that case, the late How Han Teh deposited the documents of title of two lots of lands to Mercantile Bank Limited for the purpose of securing a loan. Mercantile Bank never entered a lien-holder's caveat over the two lots of lands until the filing of a bankruptcy proceedings against the late How Han Teh. The Official Assignee argued that Mercantile Bank are not lien-holders of the property at the time of the act of bankruptcy as the caveat was entered subsequently after the act of bankruptcy. The court held that Mercantile Bank had a prior interest over the land despite the non-filing of a lien-holder's caveat which precedes the Official Assignee's right. In that case the court speaking through Raja Azlan Shah (as His Royal Highness then was) held that:

It is settled law that when the said How Han Teh was adjudged a bankrupt on 19th November, 1966, the Official Assignee stepped into his shoes, and the latter's title relates back to and commences at the time of the act of bankruptcy, that is, on 17th June, 1966. At that time what is the nature of the bankrupt's property? There are the two pieces of land but the Official Assignee claims that the applicants are not the lien-holders on this property as at the time of the act of bankruptcy there is no caveat entered under the National Land Code.

For the applicants it is submitted that at the time when the act of bankruptcy was committed the applicants with whom the issue document of titles were deposited had equitable rights to a lien in contract. He relied on the case of *Vallipuram Sivaguru v. Palaniappa Chetty, Official Administrator as Administrator of the Estate of Gan Inn, deceased* [1937] MLJ 59. In that case the 1st defendant as depositee of the document of title acquired the first right to present a caveat and so entitled to create a lien under section 134(i) of the Land Code, as against the rights of a subsequent assignee who had lodged a caveat prior to the

A 1st defendant's. In my view that case is authority for the proposition that although no lien is created under the Land Code until the caveat is registered, the court in the absence of express words in the statute is not preventing "from doing justice between parties by giving effect to equitable rights by way of contract." In other words, although failure to lodge a caveat does not entitle
B the depositee with whom the issue document of title is deposited, to a lien under the Code, he still possesses a right to it in equity. He can exercise that right by registering the caveat under section 134 at any time. In dealing with such equitable rights the courts in general act upon the principles which are applicable to equitable
C interests in land which are not subject to the statutes. In the case of two conflicting equities, the first in time prevails, all other things being equal.

Now, section 218(1) of the National Land Code is virtually identical to section 134(i) of the Land Code, ie, registration of the
D caveat is still an essential ingredient for a valid statutory lien and unless there are express words in the Act, this court is not precluded from giving effect to equitable rights existing between the parties. It therefore follows that at the time when the act of bankruptcy was committed the applicants had an equitable right to
E a lien and the trustee in bankruptcy who steps into the bankrupt's shoes, takes a title no better than him. He takes subject to the same equities as affected the property in the bankrupt's hands. (see p. 198 of the judgment)

[142] Mr Robert Lazar sought to distinguish *Sivaguru*'s case by
F submitting that equitable rights are of value only in relation to the immediate parties to the equity and that equitable rights must give way to third party rights. In the present case, it was said that Derrick is a third party who had absolutely no knowledge and was not put on notice that the proprietor (Loh) had allegedly
G deposited his title as security to a lender (Consolidated Credit). He also said that these cases do not in any way address the question as to the practical effect of such an equitable lien as s. 281(2) NLC only permits an order for sale upon the holder of the lien having obtained judgment for the amount due to him and
H the holder of the lien is only entitled to a lien upon the entry of the lien-holder's caveat. Mr Lazar however, very properly conceded that he could not argue that there is no such thing as a lien in equity under Malaysian land/equity jurisprudence.

I

[143] In the circumstances, it was submitted for Consolidated Credit, that even being treated as a lien-holder in equity with an imperfect lien they still retained the right to the property over Derrick. This is predicated on the principle that the courts have recognised that the NLC did not exclude an equitable lien and that a lien-holder's caveat was construed as relevant only for the purpose of creating a statutory legal lien. It was also submitted that Consolidated Credit as the lien-holder in equity does not need to enter a lien-holder caveat to perfect the statutory lien and that the possession of the title deposited for security will give priority to the lien-holder and that the lien-holder (Consolidated Credit) can enter a lien-holder's caveat at any time.

[144] In this regard, I was also referred to an article written by Judith Sihombing - *The National Land Code - A Commentary* at para. 5604 LexisNexis 2011 and an article titled "*The Concept and Nature of Liens and the Legal Effect of Imperfect Liens under the Peninsular Malaysian Land Law*" by Yong Chiu Mei in The Law Review 2007 in support of the propositions made by counsel for Consolidated Credit.

[145] Counsel also referred to the Federal Court in the case of *Chuah Eng Khong v. Malayan Banking Bhd* [1999] 2 CLJ 917 which had also decided that the NLC does not preclude the operation of equity. Next the case of *Standard Chartered Bank v. Yap Sing Yoke* [1989] 1 CLJ 530; [1989] 2 CLJ (Rep) 500 was cited for the proposition that the depositee of an issue document of title acquires an equitable interest over the land immediately upon the such deposit and that the depositee has the right to lodge a caveat over the land at any time under the provision of the NLC. As such, it was submitted in the present case that Consolidated Credit had acquired a lien in equity over the said land as soon as the issue document of title was deposited with the Consolidated Credit as security for loan on 29 March 1998.

[146] Counsel emphasised that the fact that Consolidated Credit had entered the lien-holder's caveat a day later than Derrick's second caveat is immaterial and does not affect the equitable right of the Consolidated Credit as they acquired an equitable right over the subject land on 29 March 1998.

[147] Reference was also made to the case of *United Malayan Banking Corporation Bhd v. Goh Tuan Laye & Ors* [1975] 1 LNS 187; [1976] 1 MLJ 169 where His Lordship Tun Suffian, the Lord President said:

> ... possession of the title gives them an equitable interest in the land, which is not affected by the absence of a caveat, as a caveat in itself does not create an interest but merely gives notice to the world of the presence of an interest belonging to someone other than the registered proprietor.

[148] On the other hand, Derrick's contention is that he had obtained a court order to compel Loh to sell and transfer the subject land to him. Derrick had entered the second caveat on the said land on 4 June 2007. However, it was argued for Consolidated Credit that the deposit of the issue document of title with Consolidated Credit occurred on 29 March 1998 and therefore they had obtained a lien in equity over the land on 29 March 1998, whereas Derrick obtained the court order compelling the Loh to sell the said land to him on 13 November 2003 and made full payment of the purchase consideration on 26 March 2007 which was well after Consolidated Credit had obtained a lien in equity.

[149] It was argued for Consolidated Credit that by virtue of the deposit of the issue document of title with them on 23 March 1998 they are entitled to priority in interests over the property and their equitable right or lien in equity arose earlier in point of time and thus had priority being the first in time. As such, Derrick's contention that his private caveat was lodged a day earlier than Consolidated Credit's lien-holder's caveat does not affect the rights of the Consolidated Credit as the holder of an equitable interest over the subject land. Consequently it was said that registration of a private caveat Derrick on 4 June 2007 (second caveat) does not confer a proprietary right over the property. In this regard, counsel relied upon the case of *Mercantile Bank Ltd v. The Official Assignee of the Property of How Han Teh* [1969] 1 LNS 106; [1969] 2 MLJ 196 where the court had held that:

> ... the registration of the caveat does not confer priority nor does it create new right. It temporarily protects such rights in anticipation of legal proceedings.

[150] Similarly, in the present case, it was argued that even assuming that Derrick has an equitable interest in the subject land by virtue of the order of 2003 judgment and payment of the full purchase consideration on or around 26 March 2007, Consolidated Credit's equitable interest in the form of a lien in equity being first in time, must necessarily prevail over the rights of Derrick.

[151] The decision of Taylor J in *Wilkins And Others v. Kannammal & Anor* [1951] 1 LNS 108; [1951] MLJ 99 CA, was referred to by counsel for Consolidated Credit where he said "the Torrens law is a system of conveyancing; it does not abrogate the principles of equity." Also, reference was made to *Butler v. Fairclough* (1916-17) 23 CLR 78, which was approved by the Privy Council in *Abigail v. Lapin* [1934] AC 491 where Griffith CJ had said:

> It must now be taken to be well settled that under the Australian system of registration of titles to land the Courts will recognize equitable estates and rights except so far as they are precluded from doing so by the Statutes. This recognition is, indeed, the foundation of the scheme of caveats which enable such rights to be temporarily protected in anticipation of legal proceedings. In dealing with such equitable rights the Courts in general act upon the principles which are applicable to equitable interests in land which is not subject to the Acts. In the case of a contest between two equitable claimants the first in time, all other things being equal, is entitled to priority.

[152] In an attempt at diluting or repudiating any priority of interest that may have arisen in favour of Consolidated Credit, it was argued on behalf of Derrick that he had lodged a caveat as early as 26 February 2000 and Loh would have had notice of the entry of the caveat and yet chose not to even apply to remove the caveat. Likewise, Consolidated Credit as the holder of the alleged equitable lien should have applied to remove that caveat but did not do so. Apart from saying that Loh was the managing director of Consolidated Credit, Derrick has also in his affidavits testified to the presence of other directors in court during the proceedings and they would definitely have known that Derrick was pursuing his claim for specific performance against Loh.

[153] Counsel for Derrick maintained that if at all Consolidated Credit did have possession of the document of title since 29 March 1998, then they had not asserted their alleged interest in the property at any time in the course of the proceedings in

respect of Derrick's claim to the property *via* the 2000 suit and before the 2003 judgment or, for that matter, before the Court of Appeal under civil appeal no. P-02-989-2003 and before the Federal Court under civil application no. 08-14-2006 (P) ('the original proceedings'). As for Consolidated Credit's knowledge, it was said that they would have been fully aware of the original proceedings, having regard to the following:

(i) Loh was the managing director and shareholder of Consolidated Credit until his resignation as managing director on 22 May 2007; and

(ii) Loh's wife (Gladys Loh Yeap Chin Joo) and sons (Laurence Loh Kwong Yu and Nigel Loh Kwong Weng) are and were at all material times the directors and shareholders of Consolidated Credit.

[154] It was argued for Derrick, that if at all Consolidated Credit had possession of the document of title since 29 March 1998, then they are guilty of dilatoriness and indolence in as much as they had only lodged the lien-holder's caveat against the property after some nine years later, and well after Derrick had become the beneficial owner of the said land on 26 March 2007 ie, the date of payment of the purchase price of RM60,000 in pursuance of the 2003 judgment. In any case, Mr Robert Lazar submitted that even if Consolidated Credit had a lien in equity which had priority over Derrick's beneficial interest in and over the property by virtue of the 2003 judgment and the payment of the full purchase consideration of RM60,000 on 26 March 2007, such priority which they have had was lost due to gross inaction/omission and/or delay on the part of Consolidated Credit to timeously assert their rights and interest in and over the property. This therefore brings me to the next issue, ie the loss of priority.

Equity Will Not Assist The Indolent/Loss Of Priority

[155] The last but decisive point in this discussion is about the loss or forfeiture of priority of equitable interest. In this regard it is useful to refer to *Snell's Equity*, where the author cited the observation made by Lord Camden LC in *Smith v. Clay* (1767) 3 Bro CC 639, who had this to say:

> In the words of Lord Camden LC, a court of equity 'has always refused to aid stale demands, where a party has slept upon his right and acquiesced for a great length of time. Nothing can call

forth this court into activity, but conscience, good faith, and reasonable diligence; where these are wanting, the Court is passive, and does nothing.' Delay which is sufficient to prevent a party from obtaining an equitable remedy is technically called laches.

[156] Next, His Lordship Ahmad Fairuz JCA (as he then was) when delivering judgment for the Court of Appeal in *Jasalam (M) Sdn Bhd v. Wong Koon Yee* [2000] 2 CLJ 377 ("*Jasalam*'s case") said:

The Respondent, although being the first in time in acquiring the equitable ownership to the said portion, has lost his priority by his indolence and omission to register his title to the said portion or to enter a caveat within reasonable time. This conduct of the respondent certainly had caused prejudice to the appellant, for, if the appellant had known about the respondent's equitable interest in the said portion, the appellant might have not bought the land or might have bought the land at a cheaper price. The appellant is entitled to priority and the caveat should be removed.

[157] In *Sivaguru*'s case the court said:

In dealing with conflicting equities, the fundamental maxim that applies is "*qui prior est tempore, potior est jure*" unless the party having the prior right in point of time, has done anything to forfeit his priority. (see p. 60 of the judgment)

[158] In the same case it was said that:

The case turns admittedly upon a question of priority of equities. By the deposit with him of the issue document of title the first defendant undoubtedly acquired certain valuable rights, *inter alia* the right to retain the deeds and the right to acquire a lien over the land under the Land Code by registering a caveat under section 134. He can exercise this latter right at any time. As between himself and the plaintiff he admittedly has the prior equity and in the absence of other factors that priority in point of time must prevail. Has he done anything which will postpone his prior equity to the plaintiff's subsequent equity? Mr. Jeff on behalf of the plaintiff-appellant argued that the neglect to put on a caveat was such an omission on the part of the first defendant as to cause him to lose his priority. The system of registration of titles to land in the Federated Malay States being based upon the Australian Torrens System, the judgment of the Privy Council in the case of *Abigail v Lapin* (1934) AC 491 on appeal from the High Court of Australia affords a valuable guide as to the

principles to be applied in considering such a question. Lord Wright, at page 501, quotes with approval the following passage from the judgment of an Australian Chief Justice in an earlier case:

> It must now be taken to be well settled that under the Australian system of registration of titles to land the Courts will recognise equitable estates and rights except so far as they are precluded from doing so by the statutes. This recognition is, indeed, the foundation of the scheme of caveats which enable such rights to be temporarily protected in anticipation of legal proceedings. In dealing with such equitable rights the Courts in general act upon the principles which are applicable to equitable interests in land which is not subject to the Acts. In the case of a contest between two equitable claimants the first in time, all other things being equal, is entitled to priority. But all other things must be equal, and the claimant who is first in time may lose his priority by any act or omission which had or might have had the effect of inducing a claimant later in time to act to his prejudice. (see p. 62-63 of the judgment).

Findings (Lien In Equity And Priority)

[159] The principles of law/equity that may be culled from the cases that were adverted to by counsel may be summarised and restated as follows:

(i) The NLC does not abrogate rights in equity affecting land;

(ii) No statutory lien is acquired under the NLC until the lien-holder's caveat is registered but that does not prevent the depositee of the document of title from having some equitable right outside the NLC;

(iii) A lien in equity or equitable lien or imperfect lien may be said to exist as a right alongside and with priority over any statutory right or interest that may be acquired under the NLC or any other equitable right or interest;

(iv) The registration of a caveat only gives notice to the world at large of a claim to title to land or an interest in and over the land but does not of itself create any interest in land nor does it accord priority;

(v) The rule relating to priority of interests is that in equity, all things being equal, the first in time prevails; and

(vi) Priority of any equitable interests may be lost or forfeited due to any act or omission or indolence of the claimant of the prior equitable interest which might have had the effect of inducing a claimant later in time to act to his prejudice.

[160] Next, having regard to the factual matrix as discussed above and the principles of law that are to be gathered from the cases alluded to by counsel and summarised above, and proceeding on the assumption that the title to the property was in fact deposited with Consolidated Credit in or around March 1998, I am of the view that notwithstanding their failure to enter a lien-holder's caveat timeously, they would have acquired a lien in equity or interest in the property which has priority over any other interest legal or equitable that may arise subsequently thereafter.

[161] However, it is also necessary to consider whether the priority in respect of the lien in equity was lost or forfeited due to any act or omission or indolence on the part of Consolidated Credit which caused Derrick to act to his prejudice. In this regard, having given the matter my most anxious consideration, I am impelled to the conclusion that based on the principles as may be gleaned from the cases such as *Jasalam* and *Sivaguru*, and applying those principles to the facts of the present case, the priority that was acquired, if at all, out of the equitable interest or lien in equity was lost or forfeited, as Consolidated Credit had only lodged the lien-holder's caveat on 5 June 2007 ie, nine years later and subsequent to the conclusion of the original proceedings in favour of Derrick, and the accrual of Derrick's beneficial interest in the said land on 26 March 2007 ie, the date of payment of the purchase price of RM60,000 in pursuance of the 2003 judgment and its unconditional acceptance by Loh.

[162] In this regard, I am also in agreement with counsel's submissions when he said that the conduct on the part of Consolidated Credit in lodging the lien-holder's caveat subsequent to the conclusion of the original proceedings and the accrual of Derrick's beneficial interest in the property caused prejudice to Derrick, for if the said lien-holder's caveat had been entered against the property on or about 29 March 1998 or prior to commencement of the trial in the 2000 suit, Derrick would have

known about Consolidated Credit's purported equitable or legal interest as the holder of a statutory lien over the property and, consequently, could have either:

(i) made the necessary application to cancel or remove the lien-holder's caveat prior to the commencement of the trial in the 2000 suit; or

(ii) included Consolidated Credit as a co-defendant to the said proceedings before the High Court to enable an effectual and complete determination of the issue over Derrick's claim to the property *vis-à-vis* the issue over Consolidated Credit's purported equitable interest in the property; or

(iii) amended his claim in the 2000 suit to seek appropriate monetary compensation from Loh *in lieu* of specific performance for the purchase of the property.

[163] Hence assuming that there was a deposit of title to the property by Loh in March 1998, then by having lodged the lien-holder's caveat on 5 June 2007, Consolidated Credit are guilty of inordinate and unexplained delay to say nothing of inaction or omission *vis-à-vis* notification to Derrick. Of course, I am aware of the observation of the court in *Sivaguru*'s case, that the mere failure to lodge a lien-holder's caveat does not cause the party to lose its lien and that the lien in equity remains extant. Also the court had held in that case that the depositee may lodge a caveat at any time. That was clearly the theme of the submission by counsel for Consolidated Credit who said that they are entitled to lodge a lien-holder's caveat at any time and that they are not guilty of any inaction.

[164] However, on the facts of the present case, I am unable to agree that there has been no inaction/omission or indolence by Consolidated Credit. The facts are compelling. Also the relationship between Loh and Consolidated Credit is so closely intertwined that it would be farcical for Consolidated Credit to disavow any knowledge of the 2000 suit. Loh was managing director of Consolidated Credit at the material time and was at the heart of the 2000 suit filed by Derrick against him. As such, Loh knew everything about Derrick's claim against him and the impact that it would have on Consolidated Credit's interest in and over the property. Thus, it was wholly incumbent upon Loh as

managing director of Consolidated Credit to protect the interest of the company of which he was a shareholder, director, managing director and the director primarily responsible for its financial affairs to take appropriate steps to timeously enter a lien-holder's caveat, or to intervene in the 2000 suit. At the very least, Loh either as defendant in the 2000 suit or as managing director of Consolidated Credit should have (but did not) put Derrick on notice of the fact that the title had (allegedly) been deposited with Consolidated Credit as security for loans by the latter.

[165] Therefore, assuming there was indeed a deposit of title in 1998, then it would appear that Consolidated Credit (through Loh as its managing director) had turned a blind eye to the events that were unfolding *via* the 2000 suit (and the appeals to the Court of Appeal and the Federal Court) and did nothing notwithstanding that Derrick had succeeded in obtaining an order of specific performance with respect to the property.

[166] In all the circumstances, it is my view that even if Consolidated Credit had a lien in equity which accrued prior in time to Derrick's beneficial interest over the property, such priority as they may have had was lost or forfeited due to their wanton inaction, omission and inordinate delay.

[167] I may add that, since March 1998 (when the deposit of title allegedly took place), third party rights ie, Derrick's rights had crystallised under the 2003 judgment and the accrual of beneficial ownership of the property as at 26 March 2007 when he paid the full purchase consideration to Loh, which, coupled with the fact that Derrick knew nothing whatsoever of Consolidated Credit's alleged lien in equity, entitles the court as a matter of discretion and in the exercise of its equitable jurisdiction not to lean in favour of Consolidated Credit as a party asserting rights in equity. In this regard, it is apposite to quote from the case of *Bhagwan Singh & Co Sdn Bhd v. Hock Hin Bros Sdn Bhd* [1986] 2 CLJ 224; [1986] CLJ (Rep) 300; [1987] 1 MLJ 324 where Justice Edgar Joseph Jr J (as he then was) said: "... the Torrens system does not prevent the court from doing equity where the rights of third parties have not intervened: *Loke Yew v. Port Swettenham Rubber Company* [1913] AC 491." Hence, the position I take is that since Derrick's rights as a *bona fide* purchaser for value without notice of any earlier lien in equity had crystallised and intervened, Consolidated Credit's lien in equity (if any) no longer has any currency and may not be enforced.

[168] There is one final point which has been raised but which is not necessary for me to deal with and it has to do with the point whether the holder of a lien in equity can apply for the remedies available under the NLC without lodging a statutory lien-holder's caveat. I am of the tentative view that if the remedies under the NLC are to be pursued then a statutory lien-holder's caveat must be in place as a pre-requisite before the remedies of an order for sale etc can be made in favour of the holder of the lien. But as this point was alluded to in passing and not fully argued, I will leave it to the parties if they so desire to have it ventilated in another forum provided the occasion and opportunity presents itself.

[169] In any event, the tentative view that I hold is no different from the view advanced by Yong Chiu Mei in an article published in *The Law Review* 2007 (p. 579) titled "*The Concept and Nature of Liens and the Legal Effect of Imperfect Liens under the Peninsular Malaysian Land Law*" where she said that:

> Thus far it appears that there has not been any reported case which deals with an application for sale by an un-caveated lien-holder for sale under the National Land Code. It is suggested that, so long as a lien-holder's caveat is still to be entered so as to create a lien over land, the lender is not entitled to the remedy of sale under the National Land Code. His only option would seem to be to attach and sell the land as an unsecured creditor. This would further support the suggestion that what is recognized and protected by the court in equity is the "right" to create a statutory lien over the land, rather than an equitable version of a statutory lien (see p. 586 of the article).

The view advanced by the author seems to be supported by the following observation made by Raja Azlan Shah (as His Royal Highness then was) in *Mercantile Bank Ltd v. The Official Assignee of the Property of How Han Teh* [1969] 1 LNS 106 [1969] 2 MLJ 196 where he held that:

> ... although no lien is created under the Land Code until the caveat is registered, the court in the absence of express words in the statute is not preventing "from doing justice between parties by giving effect to equitable rights by way of contract." In other words, although failure to lodge a caveat does not entitle the depositee with whom the issue document of title is deposited, to a lien under the Code, he still possesses a right to it in equity. He can exercise that right by registering the caveat under section 134 at any time.

In the result, it would appear that the equitable lien-holder would have to register the lien-holder's caveat as provided for under the NLC in order to obtain the statutory reliefs of an order for sale of the property.

The Orders

[170] For the reasons as stated above and conclusions that I have reached on each of the issues that were raised in these proceedings above, Derrick's application succeeds and Consolidated Credit's application fails. I therefore allowed prayers (i), (ii), (iii), (iv) and (v) of Derrick's application in OM 25-60-2008 and dismissed OS 24-591-2008. I ordered Consolidated Credit to pay a sum of RM40,000 to Derrick as total costs for both applications (OM and OS). I made no order of costs in respect of Pendaftar Hakmilik Tanah, D1 in OM 25-60-2008 and the Estate of Loh or D2. I also ordered that Derrick will have liberty to apply. Counsel for Consolidated Credit intimated that he had instructions to appeal and made an oral application for stay. I held that since Derrick is in possession and occupation of the property, there is therefore no status quo that needs to be preserved pending any appeal, but as regards the original title deed ie, the replacement title (pp. 2-6 bundle B), it should be handed over to Derrick's solicitors, Messrs Shearn Delamore within 14 days of service of the Sealed Order or its extraction, if taken out by solicitors for Consolidated Credit on the condition that the issue document of title for the property is to be kept by Messrs Shearn Delamore pending disposal of the appeal to the Court of Appeal and it is not to be transferred in the name of Derrick or any of his nominees. I ordered that there be a stay of that part of the order herein relating to assessment of damages, pending disposal of the appeal. However, there is no stay in respect of the order of costs made against Consolidated Credit. I directed that a single order be taken out by Messrs Shearn Delamore. In the event that Consolidated Credit failed to deliver the title as part of the conditional stay granted herein, then the entire stay order will lapse and Derrick is entitled to enforce the terms of the order/ judgment made today.

[171] Lastly I wish to place on record my gratitude to both counsel for assisting me with their in-depth research and eloquent submissions on the multifarious issues that were inherent in this case.